CALIFORNIA COASTKEEPER ALLIANCE
PO Box 3156, Fremont, CA 94539
(510) 770 9764 www.cacoastkeeper.org

April 8, 2008

The Honorable Daniel W. Hancock, Chair and Commissioners
Little Hoover Commission
925 L Street, Suite 805
Sacramento, CA 95814
c/o Mark Martin, Project Manager

VIA ELECTRONIC MAIL

Re: Testimony of California Coastkeeper Alliance on the State Water Resources Control Control Board and Regional Water Quality Control Boards

Dear Chair Hancock and Members of the Commission:

The California Coastkeeper Alliance (CCKA or Alliance) advocates statewide for clean water and a healthy coast on behalf of itself and California's 12 Waterkeeper groups, which span the coast from the Oregon border to San Diego.[1] On behalf of CCKA and California's Waterkeepers, I welcome the opportunity to provide this written testimony to the Commission on the operation and governance of the State Water Resources Control Board and Regional Water Quality Control Boards ("State Board" and "Regional Boards").

California's Porter-Cologne Water Quality Control Act (Porter-Cologne) notes that "[a]ll water within the State is the property of the people of the State." Study after study, however, shows that the overall health of the public's waterways is now steadily eroding. Climate change may represent the proverbial straw that will break the increasingly tenuous balance between our current lifestyles and the limited carrying capacity of our waters. The life that depends on these waterways – that is, all of us – cannot help but be increasingly harmed each step that brings us closer to that potential breaking point.

For example: the Bay-Delta Estuary flirts with ecological death, and yet "waivers" on controls for industrial agriculture pollution continue, amounting to little more than crossed fingers. Livestock operations along the Central Coast, implicated in hundreds of serious injuries and deaths from *E. coli* O:157 poisoning, continue to pour pollutants into already-fouled waters with virtually no permitting at all. Regional Boards liberally extend schedules for compliance

[1] CCKA's Board of Directors consists of the Executive Directors of each member Waterkeeper organization: San Diego Coastkeeper, Orange County Coastkeeper (including its Inland Empire Waterkeeper chapter), Santa Monica Baykeeper, Ventura Coastkeeper, Santa Barbara Channelkeeper, San Luis Obispo Coastkeeper, Monterey Coastkeeper, San Francisco Baykeeper, Russian Riverkeeper, Humboldt Baykeeper, and Klamath Riverkeeper. The California Waterkeepers' patrol areas can be found at: http://www.cacoastkeeper.org/california-waterkeepers.php.

with clean water standards for those wastewater dischargers that do hold permits, crippling enforcement and foreclosing action by citizens to protect their own communities. The State Board itself was granted enforcement authority over a year ago but has yet to use it meaningfully or even develop a clear plan for using it fully. And waterways continue to be over-allocated and over-drawn, with no clear path for making hard decisions about water "rights" that will be certainly, and perhaps quite soon, be as dry as the paper they are printed on.

California has little time left to take decisive action to reverse this course. We must identify and implement clear, aggressive, regularly accountable actions that stop pollution, restore flows, and respect the interdependency of water and life. California and federal laws provide wide authority and mandates to stop the despoiling and diverting of our waterways and to bring waters back to health. For myriad reasons, all of which apparently seem insurmountable but are in fact simply a test of will, much of this authority lies dormant. California has yet to commit to Porter-Cologne's assertion that the "quality of all the waters of the state shall be protected for use and enjoyment by the people of the state." More significantly, the state is far from committing to, let alone achieving, the Clean Water Act's goals that the discharge of pollutants be "eliminated," and that all waters be "fishable and swimmable."

The Commission has asked specifically for the answers to certain overarching and related questions, which are responded to below. In brief, there are several key, systemic problems that can be addressed only with a major re-assessment of how the state does business in protecting the public's waters. Most significantly, the system by which water pollution is regulated in the state is inherently flawed, in that it places the burden of controlling pollution on the public, rather than on those who would use the public's waters to dispose of their contaminants. It does this by requiring the State and Regional Water Boards (and U.S. EPA) to set standards for an acceptable amount of pollution, write permits to implement those standards, and enforce those permits, all while facing continual challenges from dischargers seeking more lenient limits. The alternative – requiring the regulated community to prove to the satisfaction of the public that their pollution releases do not impact the environment before they may release those contaminants into the public's waters – would require significant legislative and administrative overhauls. Nonetheless, at some point this alternative must be considered, because the current, staff-intensive regulatory system simply is not designed as a practical matter to achieve clean water, and at most can only slow degradation.

Assuming that the current regulatory system remains in place for the near term, an additional systemic, and related, problem is critical staff shortages, particularly at the Regional Boards. The Regional Boards shoulder the vast majority of the permitting, enforcement and cleanup tasks, and yet have relatively few staff to accomplish these goals for a state that represents the world's eighth largest economy. Moreover, the budget provided to the Little Hoover Commission by the State Board on staff allocations shows that in many key areas, personnel are congregated at the State Board, rather than on the ground in the regions, where the vast majority of the actual permitting and enforcement is taking place. Staff allocations among the State and Regional Boards must be re-examined to ensure maximum efficiency in implementing actions that move the state toward cleaner water in a measureable way.

Staff shortages lead to a third systemic problem, which is the relatively high percent of staff time spent on permitting, particularly Clean Water Act discharge permits, rather than on enforcement. Because U.S. EPA places a higher priority on the state's issuance of timely

NPDES discharge permits, staff resources tend to go to writing these permits first, rather than to enforcement of the conditions of the permits. Staff resources also are directed away from both permitting and enforcement of non-Clean Water Act discharges regulated under state law, such as agricultural runoff and discharges to groundwater, which are enormous threats to the health of the public's waters.

Finally, these systemic problems are exacerbated by the lack of transparency and direct accountability of the Regional Boards to the public. After many years and millions spent in attempts to track water quality, permitting and enforcement data, the state still struggles with providing accurate information on its progress to the public. This is particularly important in light of the fact that California is the only state in the nation in which water quality law is implemented largely by multiple regional water agencies, rather than a single statewide agency. Yet only the State Water Board – not the Regional Boards – is held directly responsible by law to the public for meeting clean water requirements. Specifically, citizens have the authority to petition U.S. EPA directly to take back or modify some or all of the State Board's authority if the State Board substantially fails to implement its legal duties. But if a specific Regional Water Board substantially fails to implement its equivalent duties, there is no similar recourse for citizens, the state or U.S. EPA. Without transparent accounting to the public, and a mechanism for the public to hold its administrative agencies to their legal mandates in light of that accounting, pollution continues almost unabated.

* * *

We provide below answers to the Commission's specific questions to CCKA:

1. What are the state's most pressing water quality issues, and does the state have the appropriate governance structure to properly respond to current and future issues? What changes are needed? What are the key barriers in the state to improving water quality?
2. Does the state board have sufficient accountability measures and authority to ensure that California can protect and improve water quality through the actions of the nine regional boards? Should it have more power to direct the regional boards' actions? What is the appropriate relationship?
3. How can the state balance the needs of business for economically-viable regulations with environmental needs?
4. How can the state and regional boards improve consistency, timeliness and transparency in performing duties, such as basin planning, adopting Total Maximum Daily Load (TMDL) projects and permitting?
5. Do structural issues exist within regional boards that should be changed, such as the composition of the regions, number of board members and the role and duties of the executive officer? Please explain the goals of SB 1176 and why the legislation would improve the state's water quality governance structure.

We also include additional observations that we feel the Commission will find useful in carrying out its charge, and look forward to providing the Commission with further information at the April 24th public hearing.

What are the state's most pressing water quality issues, and does the state have the appropriate governance structure to properly respond to current and future issues? What changes are needed? What are the key barriers in the state to improving water quality?

The most pressing water quality issues vary depending on the area of the state at issue, though polluted stormwater and non-stormwater runoff, because of their relative lack of regulatory oversight, tend to dominate. One reasonable metric of surface water contamination is the state's list of impaired waters, required by Section 303(d) of the federal Clean Water Act. CCKA has mapped California's impaired waters and developed sub-maps of impairments for key contaminants to illustrate the range of problems across the state; *see* http://www.cacoastkeeper.org/impaired_waterbodies.php.

Statewide ambient data on surface water health in general, though, is sparse, and groundwater contamination data are even less available. Some work has been done to examine public health concerns, such as nitrate and arsenic in groundwater used for drinking water; *see* http://www.waterboards.ca.gov/water_issues/hot_topics/strategic_plan/docs/2008_2012/020608_presentation.pdf. Slide 8 shows, disturbingly, that 42% of wells investigated are impacted by nitrate[2] and 20% by arsenic. Since a significant percentage of Californians depend on groundwater for drinking water and other uses, and since contaminated groundwater is extremely costly to clean up once contaminated, far more attention needs to be paid to protecting the quality of the state's groundwater basins than occurs now.

Given the sheer size and geographic and demographic complexity of California, the current structure of basin-oriented Regional Boards focused on local needs makes sense from the perspective of addressing such unique local needs most efficiently. Every region is quite different in terms of hydrology, rainfall, background water quality, surface water uses, land uses, aquifer formations, and other variables. The current structure allows regions and communities to be able to impose more stringent regulations than in other areas of the state, if needed and desired in light of local conditions. The State Board fulfills a valuable role in coordinating these nine Regional Boards, but it should not try to homogenize down standards across the state, such as through state policies that lower the bar on regions that are ahead of the curve in trying to address pollution. Rather, the State Board should take a leadership role in implementing the Clean Water Act goals of aggressively pushing discharges to zero, and ensuring all waters are "fishable and swimmable," by: (a) supporting actions that go beyond the minimum required, and (b) calling out Regional Boards who fail to implement the law.

Under its current authority and structure, the State Board can and must – but generally fails to – call out under-performance at the Regional Board level. This is particularly true with respect to enforcement of NPDES permits. For example:

- As of August 2007, over 20% of wastewater discharge permits statewide had expired; two Regional Boards accounted for three-quarters of all expired permits.
- The number of enforcement actions completed for wastewater permit violations in 2007 varied by Regional Board from 0 to 100%.

[2] Nitrate is one of the most common groundwater contaminants in rural areas. It is regulated in drinking water primarily because excess levels can cause methemoglobinemia, or "blue baby" disease. Nitrates also indicate the possible presence of other serious contaminants, such as bacteria or pesticides.

- Under half of all violations that should have received mandatory penalties in 2007 received any penalties at all. Two Regional Water Boards were responsible for almost three-quarters of these cases statewide.

These figures represent only federal Clean Water Act permit violations. Little is known about enforcement for violations of permits or other requirements under state water quality law, or about violations by dischargers who completely both ignore both laws.

Its most recent 13385(o) enforcement data report,[3] the State Board stated obliquely that "[t]he data indicate an uneven distribution of the average number of violations per facility among the different Regional Water Board offices." Rather than delve more deeply into the actual enforcement performance of the Regional Boards and naming the reasons for appropriate versus inadequate enforcement levels, the State Board merely concluded broadly that "[t]he reasons for this variability include differences in facility-specific requirements, differences in Regional Water Board office processes and priority assigned to report review and data entry, and differences in rates of compliance among dischargers." This simply provides no feedback at all. The State Board should take a leadership role in identifying specifically those Regions and issues that need to be addressed, requiring the Regional Boards to report on their progress in those areas, and making public the Regions responses, to ensure that those responses actually do occur.

The State Board could also take a leadership role by raising the bar on implementation and enforcement through its own enforcement authority against illegal discharges that a Regional Board has ignored. A few, high-profile State Board enforcement actions could have a significant impact on the behavior of both the Regional Boards and of those remaining dischargers operating outside the law. However, the State Board has yet to exercise this enforcement authority in a meaningful way, or provide a plan for doing so.

The State Board could also set the standard for higher fines and penalties, which currently fail to even remotely address the damage caused by illegal discharges, and also fail to prevent future illegal acts. The State Board's just-released "Baseline Enforcement Report" states that the Regional Boards issued in total less than $5 million in fines across the entire state in FY 2006-07 – and almost 40% of that limited amount has yet to be collected. In a 1969 editorial that could have been written today (enclosed), the *L.A. Times* bemoaned the lack of fines that meaningfully promote compliance, reporting that the proposed level at the time "seems more like a cost of doing business than a deterrent." Given the size of the California economy, a few million dollars in fines, and a few million more in local improvement projects, for an entire year is indeed little more than the predicted "cost of doing business."

Calling out Regional Boards that are failing to enforce or issue realistic penalties, and taking its own strong enforcement actions followed by penalties that mean something, are appropriate roles for the State Board. Micro-managing Regional Board operations through formal reporting lines, and lowering the bar on operations and standards to the level of under-performing Boards (such as through state policies, as discussed more below) are not.

[3] *See* http://www.swrcb.ca.gov/water_issues/programs/enforcement/ for all enforcement-related reports; *see also* attached, detailed CCKA comments on the State Board's enforcement policy and data reports.

An additional, particularly important area where the State Board can take a leadership role, but has yet to do so, is in the area of regulating polluted runoff, including agricultural runoff. Unlike the Clean Water Act, which has only voluntary controls on non-stormwater runoff, Porter-Cologne requires all polluted runoff to be regulated. Porter-Cologne states that all who discharge, or propose to discharge, waste "that could affect the quality of the waters of the state" (which includes groundwater) must: (a) file a report of the discharge, and, as needed, (b) implement "waste discharge requirements" (permits) that ensure that those discharges do not impact use of the state's waters. The law does allow Regional Boards to waive these waste discharge requirements, with conditions, if the waiver "is consistent with any applicable state or regional water quality control plan and is in the public interest." However, this should be done only for truly low-impact discharges, as there are important implementation and enforcement tools in waste discharge requirements that are lacking in "waivers." For example, enforcement against violations of waivers is severely hobbled by the fact that the Regional Boards generally cannot use two of their most important enforcement tools – cease and desist orders, and cleanup and abatement orders – against dischargers who violate waivers.

U.S. EPA testified in the March 2008 Little Hoover hearing that California's agricultural runoff program is a national model. From a process perspective, California is indeed ahead of other states, since no others regulate runoff sources like irrigated agriculture pollution with mandatory controls and fees. But in terms of cleaning up pollution and preventing further degradation, which should be the metric for a "model" clean water program, the programs have clearly failed, especially in the crashing aquatic ecosystems of the Central Valley. By law, waivers of waste discharge requirements should not be granted unless they are "consistent with any applicable state or regional water quality control plan" and "in the public interest." The blanket waivers currently awarded to essentially all the state's polluted runoff dischargers belie this requirement, and deteriorating water quality is the result. It is especially difficult to support the idea of waivers being consistent with Basin Plans and in the public interest for polluted runoff discharges that drain to waters *already* listed as "impaired" under the Clean Water Act, yet such waivers are routinely granted. Waivers of waste discharge requirements should either be used appropriately – *i.e*., for truly low-impact, minor discharges – or not at all.

This is an area where the State Board could take a leadership role by reviewing current, blanket waivers and sending them back with directions to implement waste discharge requirements as needed. However, the State Board has failed to take this action where it is most critically necessary – such as in the Delta – and instead allowed more time for a fundamentally flawed process to "work," at the ongoing and accelerating expense of the state's waterways. By failing to exercise the leadership authority that it *does* have in such an important arena, the State Board cannot be assumed to be willing to exercise it if the management structures were changed to give the State Board more formal oversight over the Regional Boards. It is in large part a lack of leadership, not a lack of new management structures, which prevents California from enjoying the clean water that it should have.

Another significant impediment to achieving clean water, and one where again the State Board could take a leadership role, is staffing. We encourage the Commission to take a hard look at the amount and distribution of staff across the state. Under-staffing at the Regions is a serious issue, with full and timely permit coverage an almost impossible struggle, and comprehensive enforcement extremely unlikely at current staffing levels. Yet in many key program areas, much of the available staff are concentrated in Sacramento, rather than on the

ground in the regions. The FY 07-08 budget provided to the Little Hoover Commission illustrates these points starkly. As compared with the total of all State and Regional Board staff across the state, the State Board has:

- 100% of the water rights program staff
- 70% of the bond programs staff
- 60% of the water quality monitoring staff
- 42% of the enforcement staff
- 41% of the basin planning staff
- 36% of the nonpoint source pollution staff

The Commission would do well to ask why 60% of the monitoring staff and almost half the enforcement staff are in Sacramento, rather than working with the public and the regulated community where the pollution is being created. Though beyond the scope of these comments, the Commission should also investigate the prospect of significantly expanding the water rights program into the regions.

These percentages hide the actual number of PYs dedicated to critical tasks. For example, the budget provided the Commission shows that there are only 25.2 PYs dedicated to enforcement of water quality laws, with 10.5 at the State Board and a mere 14.7 spread throughout all of the nine regions. The State Board argues that permit-writing/compliance staffers also perform enforcement-related work. However, due to U.S. EPA permit mandates and pressure from the regulated community, if there is a conflict between permit-writing and enforcement tasks, permits will almost inevitably win. In addition, significant criticism has been raised over the effectiveness of requiring permit-writers to multi-task on enforcement. Permits are often consensus documents written with the discharger. Placing enforcement tasks on the same staffer who just acted as a negotiator with the discharger is fundamentally inconsistent with the concept of aggressive enforcement. The Governor's own former Cal/EPA Secretary Lloyd agreed, calling on the State Board to "[c]reate a clear division of duties between permitting and enforcement staff . . . and redirect more regulatory staff as enforcement activities are increased."[4] A sufficient number enforcement staff, *dedicated* to enforcement as in other agencies and located at the Regional Boards, is essential to the success of the state in enforcing water quality laws and ensuring clean water everywhere.[5]

Staff resources for enforcement also would be far more efficiently used if permits were written to be clear and readily enforceable. Currently, many permits have far too many gaps and ambiguities, making challenges easier and reducing the number of potentially controversial enforcement actions that can be taken to a mere handful. In its 1969 editorial on this topic, the *L.A. Times* was particularly prescient in calling for water quality laws to be "clarified to limit the

[4] Memorandum from Alan Lloyd, Cal/EPA to Art Baggett, SWRCB, "State Water Resources Control Board (SWRCB)" (March 23, 2005).

[5] As a side note, at the March 2008 Little Hoover Commission hearing there was a fair amount of discussion about "Midgen MMPs" (mandatory minimum penalties initially established in state law by a bill authored by Senator Migden), and the level of enforcement staff time that is directed to issuing those MMPs. What was not discussed at the hearing is the fact that there was a reason that law was put into place, which was that the Regional Boards were in general failing to issue any meaningful penalties at all. The MMP system may benefit from a review, particularly since less than half of these ostensibly "mandatory" minimum penalties were issued in 2007. But to assume it occurred in a vacuum would be simply incorrect.

possibility of delaying legal tactics by violators to the detriment of the public interest." Former Cal/EPA Secretary Tamminen similarly found that "one of the greatest difficulties found by enforcement staff is complicated, ambiguous and/or poorly written permits." He called on the State Board to take a leadership role in ensuring that permits are "unambiguous" and enforcement consequences for violation are clear.[6] This, unfortunately, has yet to be translated into action.

The need for greater permit clarity to ensure more effective enforcement is particularly true for stormwater permits, which are notoriously ambiguous and difficult to enforce without extensive staff presence in the field. As noted in the State Board's 2007 13385(o) enforcement data report,

> the vast majority of effluent limitations in wastewater NPDES permits are numeric, which are self-monitored and self-reported by the discharger. In contrast, stormwater NPDES permits currently contain no numeric effluent limitations and instead rely upon a suite of general narrative effluent limitations, made specific by a plan that is only kept at the site. Compliance determination for these effluent limitations at stormwater facilities therefore depends heavily upon site visits that include specific observations, analysis, and documentation by Water Board staff.

* * *

Finally, while water quality is a problem in many areas of the state, there are still surface waterways and groundwater aquifers that are relatively pristine, and should receive heightened protection. In many cases the conversation about these waterways focuses on how much of their "assimilative capacity" can be taken by pollution. This conversation should change to one that focuses on how to maintain the level of quality that exists currently. Regional Boards need funding and other support to protect these high-quality waters now, before they become a cleanup situation. The State Board can and should lead this effort with a strong commitment to the letter and intent of its Anti-Degradation Policy, which unfortunately has not been a priority at either the State or Regional Board level.

Does the state board have sufficient accountability measures and authority to ensure that California can protect and improve water quality through the actions of the nine regional boards? Should it have more power to direct the regional boards' actions? What is the appropriate relationship?

As noted above, problems with tracking and correcting pollution are exacerbated by the lack of accountability of the Regional Boards, who do the lion's share of the permitting and enforcement work. Even when aware of under-performance, the public has no meaningful way to correct the path of Regional Boards that fail to implement the state and federal water quality law. This authority is essential, particularly in light of the above-described deficiencies in the State Board's assertion of its own, existing authority to redress problems in the regions.

[6] Memorandum from Terry Tamminen, Cal/EPA to Cal/EPA Board Chairs, Department Directors and Executive Officers ("Enforcement Initiative") (Nov. 30, 2004).

California is the only state in the nation in which water quality law is implemented largely by multiple regional water agencies, rather than a single statewide agency. Yet only the State Board – not the Regional Boards – is held directly responsible for meeting nationwide clean water requirements. Citizens have the authority under federal law to petition U.S. EPA directly to take back or modify some or all of the State Water Board's authority if the State Board substantially fails to implement its legal duties. But if a specific Regional Water Board substantially fails to implement its equivalent duties, there is no similar recourse for citizens, the state or U.S. EPA. The only accountability options available are: (a) expensive, lengthy, inefficient, issue-by-issue petition processes; or (b) time-consuming and costly litigation over individual discharges. There is no accountability mechanism available to address systemic failures by one or more Regional Water Boards to implement and enforce the law. SB 1176 (Perata), discussed in more detail below, takes the Clean Water Act approach of making the Regional Boards accountable to the public directly, an approach we support strongly.

Another approach that has been discussed to increase accountability is making the Regional Boards accountable directly to the State Board, such as by requiring the Executive Officers of each Regional Board to report to the Executive Director of the State Board. This approach presumes that the State Board would in fact be a better advocate for the health of the public's waters than all of the Regional Boards. While this may be true in the case of some Regional Boards, it is certainly not true in the case of others, and we have significant concerns about the effectiveness of such a system in protecting the state's overall water health.

Among other things, the State Board to date has not shown sufficient initiative to utilize its own enforcement tools (granted under SB 729 in 2006) or to take up faulty Regional Board decisions on its own motion (with only one exception in recent memory) to improve water quality. Regional Board decisions appealed to the State Board by dischargers often result in "splitting the difference" with the Regional Board, rather than a more protective interpretation of the law. Moreover, the State Board's recent state policies on water quality issues similarly tend to gravitate toward the middle or the bottom of Regional Board approaches on water quality protection, rather than pulling up all to the level of the best-performing Regional Boards.

For example, in response to the use by some Regional Boards of illegally extended schedules for dischargers to meet their permit requirements (see enclosed U.S. EPA Memorandum),[7] the State Board drafted a proposed Compliance Schedule Policy that actually *grandfathered in* all such schedules, thereby rewarding those Regional Boards that had flouted the law. Without a demonstrated commitment to raising the bar statewide, rather than negotiating a weaker solution among differing Regional Board approaches, it is questionable at best whether redrawing lines of authority to point to the State Board would enhance water quality throughout the state.

[7] As described in the enclosed U.S. EPA Memorandum to the Executive Officers of the State Board and Regional Boards 2, 4 and 5, U.S. EPA randomly selected 12 NPDES permits issued by these three Boards (most in Region 2) and examined the extended compliance schedules in those permits for meeting discharge standards. Without exception, every one of the 12 randomly selected permits failed to adequately explain why the extended compliance schedules were "appropriate," as required by the law. Indeed, EPA found based on the limited evidence provided that at least some of the schedules were clearly inappropriate and should not have been allowed. Numerous other deficiencies were also found, raising the significant question as to the level of deficiencies among permits at large, given the poor performance of the randomly chosen permits that were reviewed for the report.

Instead, coordination among the State and Regional Boards should be increased significantly, and the Regional Boards should be called out specifically in annual reports and other statewide documents on permit and enforcement activity. Currently, such reports only provide tables of statistics with no explanations of why some Regional Boards appear to be significantly underperforming. Regional Boards must be required to provide detailed information to the State Board and decisionmakers in a timely fashion when requested, and the State Board should be required to report out this information in a way that provides guidance on how to address specific under-performing Boards. The State Board should also be held accountable for using its own enforcement and other authority to take action when a Regional Board fails to act, as required by SB 729 (2006). Unless the state commits to providing the public and decisionmakers with the readily-accessible information they need to assess Regional Board activities in preventing and cleaning up pollution, re-organizations will do nothing to improve the situation, and almost certainly will delay real reform.

Finally, the State Board should be required to publicize and support the work of Regional Boards who are taking particularly active and innovative steps toward improving water quality in a measurable way, and should encourage other Regional Boards to follow that lead. Examples would include Regional Boards who are taking the lead on requiring low-impact development provisions and numeric effluent limits in stormwater permits.

How can the state balance the needs of business for economically-viable regulations with environmental needs?

This question is misplaced, for two main reasons. First, economic issues are already built into clean water laws. Section 301 of the Clean Water Act states that polluted effluent guidelines must be based on the "best available technology economically achievable" (BAT) for the category and class of point source at issue, where such technology will "result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants." This process supports the intention of Congress to use the latest scientific research and technology in setting effluent limits, pushing industries toward the goal of zero discharge as quickly as possible. In setting the BAT limitation, regulations dictate the U.S. EPA must consider the cost of achieving the BAT. However, the U.S. EPA is <u>not</u> required to balance the cost of BAT attainment against the benefit of effluent reductions. Instead, it need only estimate the costs the industry would incur and reasonably conclude that the limitations are economically achievable.

Similarly, Porter-Cologne, at Water Code Section 13241, states that:

> Each regional board shall establish such water quality objectives in water quality control plans as in its judgment will ensure the reasonable protection of beneficial uses and the prevention of nuisance . . . . Factors to be considered by a regional board in establishing water quality objectives shall include . . . (d) Economic considerations.

In other words, under the law, economic considerations are already built into water quality standards (or "objectives" under state law) and the requirements to achieve those standards. Economics are not further "balanced" with these requirements, and additional overlays of economic issues are generally not authorized, particularly since the Clean Water Act is intended to be a technology-forcing law designed to reach zero discharges.

Second, and more significantly, the question is based on a fundamentally false assumption that the needs of business are inconsistent with environmental needs. Business operates in the same space as the environment; drawing imaginary lines between the two will result in policies not based in reality, and which therefore will be guaranteed to fail. Moreover, business serves people and the environment, not the other way around. Phrasing the question as one of "business" needs, above the needs of the people who ostensibly benefit from "business," biases the answer toward the ongoing environmental degradation occurring under the present regulatory and economic systems. We have moved far from the time of the drafting of our state and federal clean water laws, when the *L.A. Times* characterized wastewater discharge as a "reasonable, limited use of the state's water resources – if such activity is carefully controlled and *does not take priority over more important beneficial uses*." (Emphasis added; *see* enclosed 1969 editorial.) Only when the state begins to accept the limitations of our shared environment will we be able to make progress in ensuring clean, abundant water for the environment, for our businesses, and for ourselves and future generations.

Finally, in his remarks at the March 2008 ECO:nomics conference in Santa Barbara, sponsored by *The Wall Street Journal* and attended by hundreds of the world's top CEOs and investors, Governor Schwarzenegger told the assembled business leaders that:

> California's environmental policies are driving a whole new industrial revolution in our state that is opening up huge opportunities for California companies to grow and strengthening our economy at a time when it could use the help….We are going in the right direction and we are very proud to be inspiring the rest of the world.

We would urge the Little Hoover Commission to think in terms of how the state as a whole system – with environment, people and the people's business inextricably linked – can work together for the benefit of all.

How can the state and regional boards improve consistency, timeliness and transparency in performing duties, such as basin planning, adopting TMDL projects and permitting?

Timeliness in performing duties depends in large part on staffing and leadership, as discussed above. "Consistency" is a concept that should be closely examined. The broad differences among the watersheds, waterways, land uses, and demographics across the state necessitate differences in regional priorities and approaches. What works along the North Coast may be very different from what is needed in the Imperial Valley, as California's Waterkeepers have found from daily experience. "Consistency" across regions in terms of all applications should not be the goal; rather, the goal should be clean water, even if some approaches differ among the regions. So the concept of "consistency" should be directed toward the limited number of fundamental assumptions necessary to any decision-making. And it should set a high bar, rather than compromise among the Regional Boards or seek the lowest common denominator.

Transparency is absolutely essential to ensuring the efficient implementation of state and federal water quality laws, particularly in light of the inevitable and necessary differences among the Regional Boards. The state has spent many millions of dollars over the last decade

attempting to track water quality, permitting, enforcement, and other key indicators, with, unfortunately, relatively little success. An intensive effort is being undertaken to reverse this trend with respect to enforcement data, though the state still has a fair distance to go. We would urge the Commission to ensure that this task is completed expeditiously, and that transparency of water health follows quickly. At a minimum, a limited suite of key, accurate water quality and enforcement indicators should be reported as soon as possible online and updated regularly.

SB 1176 (Perata) takes additional steps to improve transparency in enforcement by requiring reporting on all enforcement actions and inactions under both state and federal law. Current reporting requirements focus only on federal Clean Water Act permits; these initial reports have provided some useful information that indicates where additional action may be needed to improve performance and better achieve clean water. Expanding this reporting to include enforcement actions and inactions under state law – such as enforcement of violations of polluted runoff waiver requirements – is essential to shed light on all state efforts to ensure our waters are adequately protected. This would also include enforcement against "non-filers," or dischargers who never apply for permits, a critical and almost ignored issue raised by Commissioner Brooks in the March Little Hoover hearing.

Transparency in communications and coordination between Regional Boards is also becoming increasingly important. For example, both Regions 2 and 5 have needed to work together on TMDLs that have been held up due to problems with communication and accountability. In addition, some regions delay even moderately controversial TMDLs for many years of extended public debate, in the vain hope that parties will eventually agree. A transparent public process and results (on the Web) will help increase accountability by shedding light on when regions are performing or not. And if a Regional Board is not performing and as a result a discharger is releasing wastes into impaired waters, the State Board should exercise its own, existing authority and take enforcement action, rather than wait for the courts to set that timeline for the state.

Finally, SB 1176 would further improve transparency and accountability by requiring the Regional Water Boards to submit clear workplans with their budgets and report annually on their progress against those workplans. The bill also requires the Regional Boards to include specific schedules in their Basin Plans for actions to achieve water quality objectives, and to review and update those schedules annually. Holding the Regional Boards publicly accountable to specific, published schedules for meeting water quality standards is essential in light of the continued deterioration of the state's waterways.

Do structural issues exist within regional boards that should be changed, such as the composition of the regions, number of board members and the role and duties of the executive officer? Please explain the goals of SB 1176 and why the legislation would improve the state's water quality governance structure.

Currently, the majority of the seats on the nine Regional Water Boards are set aside for representatives of regulated dischargers. This includes cities and counties, who at a minimum are regulated under Clean Water Act stormwater permits. The Chair of the North Coast Regional Board, for example, represents wine growers who are heavily regulated in the region. The *L.A. Times* editorialized on this issue as early as 1969, finding there to be a "ridiculous, built-in

conflict of interest on Regional Water Quality Control Boards." The *Times* criticized the Boards' composition at the time, where "[b]y law, five of the seven seats are given to spokesmen for industrial, governmental, agricultural or utility users" and "[o]nly one member of the public at large is authorized, along with a delegate from fish and game interests." Little improvements have been made since then in ensuring that the public – not the regulated dischargers – is the primary entity represented on the Regional Boards. A good appointment, dedicated to representing the interests of the public and the waterways (such as former Los Angeles Board Chair H. David Nahai), will set the necessary leadership tone that all the re-organization permutations cannot hope to achieve. SB 1176 would address the issue of Regional Board composition by requiring all Board members to have water quality experience and to represent the public at large, rather than specific interest groups. It also increases the pay of Board members to ensure that the most qualified and dedicated candidates can be attracted and retained.

In addition to the membership of the Regional Boards, the size of regions can be another deterrent to implementation and enforcement of the law. For example, despite numerous egregious violations in the Klamath Basin (such as makeshift confined animal facilities, bulldozing and de-watering of salmon-bearing streams, high toxic algae concentrations in recreational areas and drinking supplies, and permit violations and sewage spills), enforcement is severely compromised by the six- or seven-hour drive from the office in Santa Rosa. Satellite offices should be considered in such cases, and any proposals to eliminate offices should provide a detailed plan for how implementation and enforcement will occur in the affected area.

As noted above, SB 1176 also would make the regional boards subject to the same public scrutiny that the State Water Board currently faces. The bill provides the public with direct petition authority to challenge a Regional Board or one of its programs that is substantially failing to meet legal requirements to assure clean water, just as now exists for the State Water Board under federal law. Without this petition authority, the Regional Boards would remain the only water quality agencies in the country who are implementing the Clean Water Act and other water quality laws with no direct line of accountability.

Please expound on any other topic you feel is relevant to the Commission's study.

An important point made by two witnesses at the March Little Hoover hearing was that water is extremely complicated, and there is much that we do not know about the ways that the health of aquatic ecosystems change with different stressors. The Delta and the Klamath are unfortunate examples of this fact. We should be fully cognizant of the limitations of our knowledge, and begin to work in a far more integrated fashion than we are now to address the root causes of existing problems. The Commission accordingly should not limit its review to governance changes within the State and Regional Boards, but also should consider opportunities for integrated governance with other state and local agencies.

For example, closer integration with DWR is important to meld water supply and water quality issues, which in general are inextricably linked, and in particular are closely tied in areas such as salmon runs, recycled water use, and stormwater control. Greater coordination with DFG also may be fruitful, given the wardens' water quality expertise and position on the ground. A pilot, integrated enforcement program with DFG's warden department is in fact beginning in the Los Angeles Region now; this idea should be explored elsewhere.

The Water Boards also should work more closely with local land use agencies, who permit developments that in a number of cases have turned out to be disasters for people and waterways. Such local partnerships also can advance solutions that get in front of pollution. For example, greater integration of effort with local land use agencies should include increasing use of low-impact development techniques at the local level, which reduces the amount of stormwater generated and so reduces both pollution and flooding dangers. As noted by U.S. EPA at the March Little Hoover hearing, initiatives such as low-impact development that put California out in front of some of its pollution issues can be far more effective in reducing waterway degradation than simply reacting to problems as they occur.

* * *

It is relatively easy to get caught up in the minutiae of our increasingly complex water problems and policies. We urge the Commission to see past such distractions and jargon, which further distance us all from our collective right to clean water. Instead, we ask that the Commission demand simple truths, implemented broadly – all pollution controlled into all waters, and healthy flows that support living, thriving waterways.

In urging passage of the Clean Water Act over President Nixon's veto in 1972, Senator Edmund Muskie argued passionately, "Can we afford clean water? Can we afford rivers and lakes and streams and oceans which continue to make life possible on this planet? . . . These questions answer themselves." We reflexively answer these questions "yes" in our minds. We must answer them "yes" in how we live our lives as well. We must start by committing, fully, to immediate, sweeping actions to control all pollution into all waters, and to ensure healthy flows that support living, thriving waterways. Our "rivers and lakes and streams and oceans" – and our children – deserve no less.

Best regards,

Linda Sheehan
Executive Director

Attachment 1: Comments from CCKA *et al* to SWRCB (Feb. 7, 2008), "Draft Water Quality Enforcement Policy" (with three enclosures)
Attachment 2: Comments from CCKA *et al* to SWRCB (Jan. 24, 2008), "Consideration and Discussion of the California Water Code Section 13385(o) Enforcement Report" (with enclosure)
Attachment 3: Editorial Board, *L.A. Times*, "Water: Public vs. Polluters" (Feb. 12, 1969) (enclosed separately)
Attachment 4: Memorandum from U.S. EPA Region IX to Executive Officers of the SWRCB and Regional Water Quality Control Boards 2, 4 and 5, "California Permit Quality Review Report on Compliance Schedules" (Oct. 31, 2007) (enclosed separately)

ATTACHMENT 1
CCKA COMMENTS ON DRAFT WATER QUALITY ENFORCEMENT POLICY
FEBRUARY 7, 2008

February 7, 2008

Ms. Tam Doduc, Chair and Board Members
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814
Via Email: commentletters@waterboards.ca.gov

Re: February 19, 2008 Workshop: "Draft Water Quality Enforcement Policy (Jan. 8, 2008)"

Dear Chair Doduc and Board Members:

On behalf of the California Coastkeeper Alliance (CCKA), which represents 12 Waterkeepers spanning the state from the Oregon border to San Diego,[8] and Heal the Bay, we welcome the opportunity to submit these comments pertaining to the above-described workshop on the Draft Water Quality Enforcement Policy (Policy). As we articulated in our June 2007 letter on scoping for this Policy (attached), enforcement of water quality laws is a significant and ongoing issue, and has been the subject of at least two Cal/EPA directives in recent years, both of which highlighted the need for major, specific improvements in enforcement at the State and Regional Water Board levels.[9] **New approaches and renewed commitments to enforcement of all sources of pollution – both point and nonpoint, and to surface water and groundwater – are needed to ensure that continued violations stop and water quality improves.**

A number of the primary concerns raised in our June 2008 letter remain, unfortunately, unaddressed in the current draft Policy. In particular, we address the following points in this letter, and refer you to the attached June 2007 letter for additional details:

- **The Policy fails to set out a process for identifying non-filers, particularly where entire categories of pollutant discharges are unregulated**. This includes failure to enforce Porter-Cologne requirements with respect to many polluted runoff discharges to surface water, as well as many discharges to groundwater.
- **The Policy fails to set out a clear process for ensuring enforcement of waivers of waste discharge requirements.** Waivers do not have many of the same enforcement

[8] Klamath Riverkeeper, Humboldt Baykeeper, Russian Riverkeeper, San Francisco Baykeeper, Monterey Coastkeeper, San Luis Obispo Coastkeeper, Santa Barbara Channelkeeper, Ventura Coastkeeper, Santa Monica Baykeeper, Orange County Coastkeeper and Inland Empire Waterkeeper chapter, and San Diego Coastkeeper.
[9] Memorandum from Terry Tamminen, Secretary, Cal/EPA to BDOs, (November 30, 2004) ("Enforcement Initiative"); Memorandum from Alan Lloyd, Secretary, Cal/EPA to Art Baggett, Chair, SWRCB, (March 23, 2005) (Lloyd Memo).

tools as WDRs, and so serious polluted runoff-borne contamination in the Delta and elsewhere is continuing essentially unabated. The Policy should be clearer about this difference and identify enforcement processes specifically geared to waivers, to ensure that discharges regulated by waivers do not continue to degrade water quality.

- **The avoidance of enforcement by permit writers continues in the form of compliance schedules and serial TSOs and needs to be addressed in the Policy.** Both compliance schedules and serial TSOs should be integrated into or at least discussed in the Policy to connect the permit writers and enforcement staff and to prevent unseen off-ramps from enforcement.
- **The Policy needs to address the process the State Water Board will follow to utilize its own enforcement authority fully.** SB 729 (2006) granted new enforcement authority to the State Water Board, which now has a separate Office of Enforcement. The Policy should lay out how the State Board will exercise that authority in coordination with the regional boards.
- **The Policy should include recommendations for action to address unenforceably vague permits.** The recent 13385(o) report highlighted the significant investment of staff resources that are needed to identify stormwater violations due to vague permits. A specific commitment should be made to increasing the use of numeric limits in permits to increase enforceability and compliance.
- **The Policy should offer additional innovative solutions to the problem of ineffective fines and penalties.** We recommend that the Policy commit to implementing a streamlined fine payment policy like the IRS model; *i.e*. a violator should submit a check for the required fine with the violation report. If legislative changes are needed to accomplish this, the Policy should identify those changes. The Policy also should either re-direct more fine money to the regions, or evaluate the effectiveness of the current system of directing fine monies to Sacramento in achieving clean water.
- **The Policy should not redirect SEP money away from affected areas.** We have some significant concerns with the Policy's proposed changes to the SEP program.

We briefly discuss each category of concerns below, and welcome the opportunity to address them with you further at the February 19th workshop.

* * *

The Policy Fails to Establish a Clear Process to Address Non-Filers, Particularly Where Entire Categories of Pollution Discharges Are Unregulated.

The Policy does not lay out a clear strategy for identifying and acting on non-filers, which is a particular problem with polluted runoff dischargers. As we already reported in our June 2007 letter but repeat here, **Porter-Cologne regulates discharges by all pollution sources, both point and nonpoint, to both surface water and groundwater**. Specifically, Porter-Cologne requires all who discharge or propose to discharge waste "that could affect the quality of the waters of the state" (defined as including groundwater) to report the discharge to the local Regional Water Quality Control Board. (Cal. Water Code § 13260.) The local Regional Board may regulate various discharges with WDRs or, if appropriate, with "waivers of WDRs, with conditions" to ensure that those discharges do not impact use of the state's waters. Water Code

section 13269(a)(1) specifies, however, that waivers of WDRs should only be issued where the Regional Board has determined that a waiver would both be in the public interest and is "consistent with any applicable state or regional water quality control plan."

Although the Porter-Cologne Act gives the Regional Boards a clear directive to regulate all sources of pollution to surface water and groundwater, including polluted runoff not regulated under the federal Clean Water Act, the Regional Boards all continue to fail to implement or enforce these provisions for one more categories of polluted runoff to surface water, and for many categories of pollution to groundwater. These illegal discharges cause and contribute to significant and lasting degradation of surface and groundwater, and yet no action on redressing these enforcement gaps is discernable.

CCKA has begun collecting information on such gaps, and attaches a table of preliminary results. One example is in Region 3, where there is abundant evidence that *E. coli* O157:H7 is a grazing- and ranching-related problem that affects waters and growing areas in Region 3 and is likely responsible for hundreds of serious injuries and perhaps several deaths from ingestion of *E. coli*-contaminated food (clearly making it a "Class I" violation). A June 2006 report[10] prepared by that Regional Board itself found that numerous water bodies are contaminated by O157:H7, and that the "most frequent occurrence of E. coli O157:H7 occurs at sites flanking areas used for grazing purposes."[1] The report added that cattle (which abut a number of affected growing areas) are significant sources of O157:H7, that the strain can persist in the soil for 10-11 months after livestock have been removed, and that O157:H7 has been found near and downstream of livestock areas.[1] The Board concluded that "what is certain is that livestock are a source of … O157:H7" in the Central Coast region, and the "livestock have been observed roaming in surface waters as well as along riparian areas" of the area. Yet there continues to be no waiver or WDR for grazing activities, in violation of Porter-Cologne. In the absence of such required action, valuable riparian habitats are being ripped out or otherwise destroyed along irrigated lands on the misguided assumption that the *E. coli* problem is associated with rodents and other small creatures, compounding the impacts of regulatory inaction. **The Policy fails to address the gap created by an enforcement system that focuses on enforcement with established regulatory programs (waivers, WDRs), rather than enforcement with the reporting/filing requirements in Porter-Cologne, which exist regardless of whether there is a formal regulatory mechanism.**

Regardless of the lack of a formally-adopted program to oversee pollution, Water Code Sections 13260 *et seq*. make it clear that **discharges that occur without required reporting/filing and without associated, necessary waste discharge requirements violate the law**. The Policy should include a process for capturing those violations and acting on them.

The Policy Fails to Set Out a Clear Process for Ensuring Enforcement of Waivers of Waste Discharge Requirements.

As is evident throughout this letter, the Policy's focus tends to be skewed toward Clean Water Act-regulated discharges. Polluted runoff, which is generally (and, we believe, incorrectly) regulated by waivers, is relatively ignored. This is particularly apparent in the case of enforcement tools, many of which apply only to discharges regulated by WDRs. Without a

[10] http://www.waterboards.ca.gov/centralcoast/TMDL/documents/SalRivFecColPrelimProjRptJuly06_000.pdf.

clear Policy section specific to enforcement of waivers and their associated (and limited) enforcement tools, the Policy creates the misimpression that waivers can be enforced effectively – when in fact, they currently are not. This is of particular concern for waiver-regulated discharges into impaired water bodies, where we would argue strongly that waivers conflict with Porter-Cologne. Accordingly, **the Policy should have a separate section specific to enforcement of waivers; this section should identify enforcement tools and processes specifically applicable to waivers, and identify enforcement gaps that may need to be filled to ensure that discharges regulated by waivers do not impact water quality**.

The Policy Should Address the Continued Avoidance of Enforcement by Permit Writers through the Use of Lengthy Compliance Schedules and Serial TSOs.

Currently, enforcement staff can miss significant violations because of permit staff who extend compliance schedules in violation of the law. As former Cal-EPA Secretary Dr. Alan Lloyd recommended, the State and Regional Boards must "[c]reate a clear division of duties between permitting and enforcement staff…."[11] While this process has begun, it is not complete until permit staff cease practices that avoid enforcement, such as use of illegal compliance schedules. The issue of compliance schedules is being addressed separately, which is a positive step, but it also should be integrated into or discussed in the Policy to connect the permit writers and enforcement staff, and to prevent off-ramps from enforcement.

In addition to lengthy compliance schedules, we have informed the Board regularly about the problems associated with "serial TSOs" and lack of enforcement of TSOs. For example, a situation exists in Region 4 where, between October 12, 2000 and December 14, 2006, the Regional Board issued seven individual Time Schedule Orders (TSOs) to the City of San Buenaventura. An eighth draft TSO is now being proposed. The continuous cycle of TSOs with interim limits is inappropriate and potentially illegal, and will ensure that the discharger is never held accountable for meeting final effluent limits. Moreover, with this precedent, it is unlikely that other permittees will take their TSO seriously. A TSO is meaningless unless it is one TSO and one TSO only, which should include enforceable milestones and mandatory minimum penalties. Enforcement should begin on the first day after the TSO deadlines pass, rather than allowing for yet another TSO with a lack of enforcement – commonplace even where effluent limits are not close to being met – to be assigned instead.[12]

The Policy Should Address the Process the State Water Board Will Follow to Utilize Its Own Enforcement Authority Fully.

SB 729 provided the State Board with its own enforcement tools, to be used "after consulting with the regional board" to ensure that State Board action "will not duplicate the efforts of the regional board." The impetus for this provision was concern over lack of Regional Board action on clear violations, which arose out of the Hilmar Cheese incident in Region 5. This problem is ongoing, as illustrated vividly in Region 2 this week (see attached news story). Cal-EPA has called for an almost unprecedented investigation into Region 2's failure to act on a

[11] Lloyd Memo at 2.

[12] *See, e.g.*, Letter from Dr. Mark Gold, Heal the Bay to Jonathan Bishop, LA RWQCB (Aug. 28, 2006); Letter from Kirsten James and Dr. Mark Gold, Heal the Bay and Mati Waiya, Wishtoyo Foundation to Deborah Smith, LA RWQCB (June 6, 2007).

2.5 million gallon sewage spill on January 25th; the Regional Board said staff didn't act immediately because they did not notice a revised report on the spill. In a letter to the Regional Board dated February 5th calling for an investigation into the Regional Board's actions, Cal-EPA Secretary Adams said the delay is "disturbing because of the potential environmental effects to the Bay through the lack of aggressive action" and stated that the Board should have immediately investigated the spill. Notably absent from this response was the State Water Board.

The Policy needs to include the State Water Board's own process for using its SB 729 authority to take enforcement action when the Regional Boards fail to do so. This is critical authority that should not be ignored in an attempt to spare a Regional Board some potential embarrassment. Carefully targeted State Board enforcement actions will help raise the bar for enforcement across the state and benefit all Regional Boards, as well as the waters that they are mandated to protect. Such actions should be the primary goal of the State Water Board's new enforcement unit, which is a potential model for separation of permit writing and enforcement that should be replicated throughout the regions.

The Policy Should Include Recommendations for Action to Address Unenforceably Vague Permits.

As discussed in detail in our June 2007 joint letter, the Cal-EPA Enforcement Initiative found that "one of the greatest difficulties faced by enforcement staff is complicated, ambiguous and/or poorly written permits or multiple, conflicting and confusing regulatory requirements that are unenforceable. Permit requirements must be unambiguous. They should be written in such a way that they are clear, easy to understand, and determining compliance is simple. Similarly, the enforcement consequences for violation should be clear."[13]

The State Water Board's recent 13385(o) report[14] similarly found that, unlike the numeric effluent limitations found in the "vast majority" of wastewater NPDES permits, which are self-monitored and self-reported by the discharger,

> stormwater NPDES permits currently contain no numeric effluent limitations and instead rely upon a suite of general narrative effluent limitations, made specific by a plan that is only kept at the site. Compliance determination these effluent limitations at stormwater facilities therefore depends heavily on site visits . . . .[15]

In other words, tracking enforcement of permits with numeric limits is far less staff intensive (and so far less costly) than tracking enforcement with narrative limits, which need site visits. As articulated in the two Cal-EPA enforcement memos referenced earlier, this clearly points to a recommendation to increase use of numeric limits in stormwater permits in order to streamline both compliance and enforcement. **We ask that the Policy include a process for incorporating numeric limits in stormwater permits wherever possible to address this ongoing issue. This is the same recommendation that former Secretary Lloyd made in 2005**:

---

[13] Enforcement Initiative at 8.
[14] SWRCB, "Draft Enforcement Report per California Water Code Chapter 5.5 Section 13385(o)" (Jan. 2008).
[15] *Id*. at 16.

> Where appropriate to achieve water quality protection, numeric limits based on sound science should be incorporated into permits that define the allowable discharge or pollutants that the Boards determine are high priority.[16]

We agree with the Secretary that numeric limits, as well as clearly established deadlines, are essential to a sound enforcement program and should be part of the Policy.

The Policy Should Offer Additional Innovative Solutions to the Problem of Ineffective Fines and Penalties.

The January 2008 13385(o) report makes numerous references to relatively low enforcement rates resulting from a lack of staff. But enforcement staff time is partly used in exercises that could be far more efficient.[17] For example, when a NPDES discharger submits a self-monitoring report indicating violations, regional board staff must then use valuable enforcement time to seek and collect the necessary penalties, even when mandatory minimum penalties are required. The process would be more efficient and staff time would be saved if dischargers included a check for the minimum fine, instead of making the Boards go after them. The Policy should explore the steps needed to implement this IRS-type process, which could be a potentially critical piece of the solution to the problems of relatively low fine collection and MMP backlogs. If legislative changes are needed to accomplish this, the Policy should identify those changes.

In addition, the Policy should explore the idea of keeping more fines and penalty money in-Region. CCKA and individual Waterkeepers have been told by a number of Regional Water Boards that since much of the fine and penalty money is re-routed to the State Board, there is a disincentive to increase costly enforcement that is not supported with fines kept in-Region. Our understanding of the reason that this has not occurred is that the State Water Board has concerns that more of the fines need to be deposited centrally and redistributed to support regions that have less of an opportunity to collect penalty money. Unfortunately, to date there has been no clear accounting of these funds to determine the extent to which the fines/penalties processing structure actually creates incentives or disincentives for enforcement. Given the serious state of the 2008-09 California budget, and the equally significant need for increased enforcement, a clear answer to this question is critical at the current time. We ask that the Policy either increase the amount of fines and penalties that are kept in-Region, or establish a process for evaluating the utility of that money in achieving clean water (a) under the current system of directing significant funds to the State Water Board and (b) under a new system of re-directing more of that money to the Regions that are investing staff time and resources in increased enforcement.

The Policy Should Not Redirect SEP Money Away from Affected Areas.

[16] 2005 Lloyd Memo at 2.

[17] The issue of enforcement staff time used to manually enter discharger reports online is another important issue that needs to be addressed expeditiously.

Many areas of the state have experienced significant water quality benefits resulting from the implementation of Supplemental Environmental Projects ("SEPs") that staff pursued in lieu of a monetary assessment imposed in an ACL complaint. The Policy, however, proposes to reduce the credit permitted for a SEP from 50% to 25%, stating that "[t]he State Water Board has a strong interest in the use of funds for SEPs that would otherwise be paid into accounts for which it has statutory responsibilities to manage and disperse." This proposed reduction in funding for SEPs would greatly limit positive regional impacts on the ground, in the areas affected by the pollution. As touched upon in the "Nexus Criteria" section of the Policy, it is important that penalty monies stay in the Region to benefit the areas that were degraded by the illegal action.

For example, as a result of a settlement for an 841,000-gallon sewage spill that closed beaches in Los Angeles County for many days, nearly $2.5 million was provided for SEPs in Los Angeles County. One of the funded SEPs will directly improve beach water quality in the vicinity of the closed beaches. If only a 25% credit was allowed, as is proposed in the Policy, Region 4 would have seen approximately $1.75 million dollars less in local program funding, an extremely significant reduction in local benefits. Further, there is no guarantee that the monies re-directed to the State Board would ever come back to the region or even be used for direct water quality improvements in general, let alone benefit the specific area impacted by the illegal activity. This is of significant concern to our organizations and others, and we ask that the 50% credit be restored.

In addition, the Policy outlines general SEP qualification criteria and includes specific examples of types of SEPs. "Public awareness projects" have been deleted from the list of example projects. In fact, education-related SEPs can be extremely beneficial. For instance, a SEP recently selected in Los Angeles County funded an 8.1-acre environmental education facility that will serve to educate the entire community on water quality issues. The State Water Board has long recognized the importance of education in protecting and maintaining water quality. Indeed, the stated mission of the State Board's Education and Outreach Program is "… to educate all Californians about the importance of water quality so that they will support our efforts and understand their role in protecting our state's rivers, lakes, streams and coastal waters." We ask that the Policy maintain public awareness projects and education programs as part of the SEP program.

* * *

The impacts of continued failure to enforce water quality laws are clear. Every listing of an impaired water body in the state is an example of a lack of enforcement, and the number of impaired waters is rising. California can afford no more delays in developing a meaningful enforcement Policy that covers <u>all</u> discharges to waters of the state, that fully uses <u>all</u> enforcement tools available to both the State and Regional Water Boards, and that identifies gaps that need to be filled in order for enforcement to be most effective.

We appreciate the opportunity to provide these comments, and we look forward to working with you to set California on an enforcement path that will ensure clean water now and in the future.

Sincerely,

Linda Sheehan, Executive Director
California Coastkeeper Alliance
lsheehan@cacoastkeeper.org

Kirsten James, Water Quality Director
Heal the Bay
kjames@healthebay.org

enclosures

Enclosure 1 to February 2008 CCKA Enforcement Comments

"Gaps in Regulatory Programs for Key Pollution Sources (Draft)"

Gaps in Regulatory Programs for Key Pollution Sources (CCKA Draft, 2-08)

Regional Board	Polluted Runoff Sources*	Control Status
(1) North Coast	*Irrigated Ag*	WDR for Wineries, no other waiver or WDR in place (but considering).
	Grazing	No WDRs or waiver program.
	Non-NPDES CAFOS	No current WDR/Waiver for non-NPDES permitted facilities, proposing some regulation of dairies high on staff priority list.
	Marinas	Considering WDR or waiver, monitoring and waiting for templates from State or other regions.
(2) San Francisco Bay	*Irrigated Ag*	Staff claims no irrigated ag, save some vineyards; Farm Bureau websites in Region indicate differently. Has issued individual WDRs to a few wineries.
	Grazing	No waivers or WDRs except waiver for TMDL purposes; currently "studying the issue"
	Marinas	Staff claimed that only facilities of concern in region are regulated under industrial storm water permit. No WDR for marinas otherwise.
	Timber	No WDRs issued; staff asserts no timber harvesting in region.
(3) Central Coast	*Grazing*	No waivers or WDRs; assessing the issue as do TMDLs.
	Non-NPDES CAFOS	No WDRs or waiver program for non-NPDES permitted facilities.
	Marinas	No WDRs or waiver program.
(4) Los Angeles	*Grazing*	No WDRs or waiver program.
	Non-NPDES CAFOS	No WDRs or waiver program. Address problems on case by case basis.
	Marinas	No WDRs or waiver program (other than general storm water permits).
	Timber	No WDRs or waiver program. Staff claims no activity in region.
(5) Central Valley	*Irrigated Ag*	Waivers; but groundwater not covered (unlike Central Coast)
	Grazing	Staff states they are working on a waiver, but it is a low priority issue.
	Marinas	No WDRs or waiver program. Staff claims they've studied it but don't think there are problems that need to be addressed. Lake Shasta has MOU with other agency to address gray water on houseboats.
	Timber	Private lands regulated by Cal Dept of Forestry and Fire Protection; RB1 serves as advisor to CDFFP in approving Timber Harvest Plans.
(6) Lahotan	*Irrigated Ag*	No WDRs or waiver program.
	Grazing	Developing waiver for grazing operators in the Bridgeport and East Walker River Watersheds, which include numerous streams listed as impaired for pathogens.
	Non-NPDES CAFOS	No WDRs or waiver program. Do have some under individual WDR (Mojave River area), considering general order; have about a half a dozen facilities in region.

Lahotan (*cont*.)	*Marinas*	Lake Tahoe Basin only (General NPDES Permit for Discharges of Storm Water Runoff Associated with Industrial Activities and Maintenance Dredging at Marinas).
(7) Colorado River Basin	*Irrigated Ag*	No WDRs, claim to address through voluntary TMDL compliance program.
	Grazing	No WDRs or waiver program.
	Non-NPDES CAFOS	Waiver applies to large facilities (over 1000 animals), otherwise no WDR or waiver.
	Marinas	No WDRs or waiver program.
	Timber	No WDRs or waiver program.
(8) Santa Ana	*Irrigated Ag*	Staff doesn't think that level of activity poses problem in watershed, though some areas in Orange Co being addressed through the 3-tier program
	Grazing	Claims no significant grazing in region.
	CAFOS	General WDR adopted 9/07 but addresses cows only - for operations that are dairies over 20 cows, or heifer/calf ranches of herd size over 50. No WDR or waiver for non-dairy facilities.
	Marinas	Nothing but voluntary education program in place.
	Timber	Claim none in region.
(9) San Diego	*Marinas*	No waiver or WDRs.

***Into surface water only.**

Enclosure 2 to February 2008 CCKA Enforcement Comments

"Comment Letter from CCKA *et al* to SWRCB: Water Quality Enforcement, June 2007"


CSPA

June 13, 2007

Ms. Tam Doduc, Chair and Board Members
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814
Via Email: commentletters@waterboards.ca.gov

Re: June 28, 2007 Workshop: "Policy Direction on Water Quality Enforcement"

Dear Chair Doduc and Board Members:

On behalf of the California Coastkeeper Alliance (CCKA), which represents 12 Waterkeepers spanning the state from the Oregon border to San Diego,[18] NRDC, Heal the Bay, Sierra Club California, Environment California, the California Sportfishing Protection Alliance, and the Pacific Coast Federation of Fishermen's Associations, we welcome the opportunity to submit these initial comments pertaining to the above-described workshop on water quality enforcement. The issue of enforcement of environmental laws generally, and water quality laws in particular, has been the subject of at least two Cal/EPA directives in recent years, both of which highlighted the need for significant, specific improvements in enforcement at the State and Regional Water Board levels.[19] While some action has been taken on several of the recommendations in these and other directives, it is our experience that there remains continued, systemic problems with enforcement that simply will not be redressed without a policy direction overhaul and accompanying redirection of staff resources.

In brief, our concerns with respect to enforcement of state and federal water quality laws can be divided roughly into the following categories:

[18] Klamath Riverkeeper, Humboldt Baykeeper, Russian Riverkeeper, San Francisco Baykeeper, Monterey Coastkeeper, San Luis Obispo Coastkeeper, Santa Barbara Channelkeeper, Ventura Coastkeeper, Santa Monica Baykeeper, Orange County Coastkeeper and Inland Empire Waterkeeper chapter, and San Diego Coastkeeper.
[19] Memorandum from Terry Tamminen, Secretary, Cal/EPA to BDOs, (November 30, 2004) ("Cal/EPA Enforcement Initiative"); Memorandum from Alan Lloyd, Secretary, Cal/EPA to Art Baggett, Chair, SWRCB, (March 23, 2005) (Lloyd Memo).

- **There is a complete failure to enforce entire categories of laws**. This includes failure to enforce Porter-Cologne requirements with respect to many polluted runoff discharges to surface water, as well as the vast majority of discharges to groundwater.
- **The system of enforcement of permits by the permit writers is inherently flawed.** The need to separate permit writing and enforcement duties was specifically identified in the 2005 Lloyd Memo.
- **Permits are written in many cases to be unenforceable.** This reflects two major concerns: first, a lack of clarity in the provisions themselves (which are often ambiguous and subjective); and second, a lack of enforceable deadlines for compliance. As to the latter, compliance schedules often extend indefinitely the time for meeting legal requirements, leading to ongoing water quality degradation.
- **There is little on-the-ground-enforcement presence.** Regular visits from personnel – State or Regional Board or other enforcement personnel – are needed both for enforcement and education purposes.
- **Fines and penalties fail to address and solve the problem at hand.** Typically low to nonexistent, they at best they appear to be driven by MMPs, which were adopted to ensure that some enforcement action was taken, not to become the focus of the enforcement program. Streamlining the MMP process would free up staff time to focus on consent decrees, higher penalties, and other measures needed to deter and redress violations.
- **There is no reliable system for staff, decisionmakers or the public to track enforcement actions and compliance rates.** Despite many millions of dollars spent over the years and clear legislative and administrative direction in this area, the State and Regional Boards have yet to develop a reliable enforcement tracking system. Without such a system, there can be no needed course correction or proper allocation of enforcement resources.

Tinkering with the existing Enforcement Policy will not address these concerns. A new approach and renewed commitment to enforcement is needed to ensure that continued violations stop and water quality improves. We outline a few examples of each category of concerns below, and welcome the opportunity to discuss them with you further at the June 28th workshop.

* * *

There Is a Complete Failure to Enforce Entire Categories of Laws.

The federal Clean Water Act regulates discharges by point sources to waters of the U.S. to protect the health of those waters. Discharges by all pollution sources, both point and nonpoint, to both surface water and groundwater are regulated by California's Porter-Cologne Water Quality Control Act. Specifically, Porter-Cologne requires all who discharge or propose to discharge waste "that could affect the quality of the waters of the state" (defined as including groundwater) to report the discharge to the local Regional Water Quality Control Board. (Cal. Water Code § 13260.) The local Regional Board may regulate various discharges with WDRs or, if appropriate, with "waivers of WDRs, with conditions" to ensure that those discharges do not impact use of the state's waters. Water Code section 13269(a)(1) specifies, however, that waivers of WDRs should only be issued where the Regional Board has determined that a waiver

would both be in the public interest and is "consistent with any applicable state or regional water quality control plan."

Although the Porter-Cologne Act gives the Regional Boards a clear directive to regulate all sources of pollution to surface water and groundwater, including polluted runoff not regulated under the federal Clean Water Act, the Regional Boards all continue to fail completely to enforce these provisions for one more categories of polluted runoff to surface water, and for almost all categories of pollution to groundwater. These illegal discharges cause and contribute to significant and lasting degradation of surface and groundwater, and yet no action on redressing this enforcement chasm is discernable. For example, the Lost River, the Scott River and the Shasta Rivers are case studies for what lack of enforcement of can do to waterways, as these rivers suffer from continued agricultural, CAFO and other discharges and are not meeting their beneficial uses beyond agriculture water supply.

The State Water Board's 2006 Enforcement Report to the Legislature indirectly acknowledges this problem by reporting only on discharges to surface water under the federal Clean Water Act.[20] There is no similar reporting for enforcement of violations under Porter-Cologne, which of course covers many more discharge activities and correspondingly more enforcement actions (in theory). If the Regional Boards do not act to enforce these laws, the State Board should step in to protect the health of the state's surface and groundwater.

Even where there is an acknowledgment that some enforcement is necessary, often violations are not handled by enforcement but by stakeholder groups that are not set up as guardians of water health. For example, the Central Valley Regional Board takes complaints from citizens about dairies discharging raw waste onto their property and waterways, and then simply forwards many of those to the Dairy Task Force, which takes little to no formal action or follow-up under state or federal water quality law. As noted in the next section, enforcement units within the State Water Board and each Regional Water Board are the appropriate entities to handle enforcement, not stakeholder groups or permit writers.

The System of Enforcement of Permits by the Permit Writers Is Inherently Flawed.

As articulated by the Secretary in the 2005 Lloyd Memo, the current system whereby the permit writers enforce their own permits is inherently flawed. Dr. Lloyd recommended instead that the State and Regional Boards "[c]reate a clear division of duties between permitting and enforcement staff, including separating Board legal counsel from enforcement attorneys, and redirect more regulatory staff as enforcement duties are increased."[21] He also recommended that there be "dedicated enforcement units at each Regional Water Quality Control Board";[22] we would add to that that there should be an attorney at each Regional Board full-time on enforcement.

In addition, in light of new SB 729 enforcement authority, the State Water Board needs to develop its own policy for taking enforcement action when the regional boards fail to do so.

---

[20] SWRCB, *Enforcement Report per Cal. Water Code Sec. 13385(o)* (Aug. 18, 2006) http://www.waterboards.ca.gov/legislative/docs/2005/enforcementrpt2004_13385o.pdf (2006 Enforcement Report).
[21] Lloyd Memo at 2.
[22] *Id.*

This is critical authority that should not be ignored in an attempt to spare a Regional Board some potential embarrassment. Carefully targeted State Board enforcement actions will help raise the bar for enforcement across the state and benefit all Regional Boards, as well as the waters that they are mandated to protect. Such actions should be the primary goal of the State Water Board's new enforcement unit, which is a potential model for separation of permit writing and enforcement that should be replicated throughout the regions.

Permits Are Written in Many Cases to Be Unenforceable.

Lack of Clarity in the Permits Themselves

The 2003 Cal/EPA Enforcement Initiative succinctly found that:

> Currently, one of the greatest difficulties faced by enforcement staff is complicated, ambiguous and/or poorly written permits or multiple, conflicting and confusing regulatory requirements that are unenforceable. Permit requirements must be unambiguous. They should be written in such a way that they are clear, easy to understand, and determining compliance is simple. Similarly, the enforcement consequences for violation should be clear.[23]

The lack of clarity and objectivity in the permits impacts enforcement, which necessarily becomes extremely staff-intensive. Straightforward requirements will lend themselves to straightforward enforcement and conserve valuable staff resources. For this reason, the 2005 Lloyd Memo recommended that:

> Where appropriate to achieve water quality protection, numeric limits based on sound science should be incorporated into permits that define the allowable discharge or pollutants that the Boards determine are high priority.[24]

We agree with the Secretary that numeric limits, as well as clearly established deadlines, are essential to a sound enforcement program.

Lack of Enforceable Deadlines for Compliance.

Permits also become unenforceable if their requirements are continually extended, as is the case with many permits now. We wrote in detail to the State Water Board on this issue in our letter dated October 19, 2006 on the problems associated with lengthy compliance schedules; this letter is included for the Board's reference.

In addition to lengthy compliance schedules, we have informed the Board regularly about the problems associated with "serial TSOs" and lack of enforcement of TSOs. For example, a situation exists in Region 4 where a discharger has received at least three TSOs over five years and is currently up to over $1 million in penalties at an F-rated beach. A TSO is meaningless unless it is one TSO and one TSO only, which should include enforceable milestones and mandatory minimum penalties. Enforcement should begin on the first day after the TSO

[23] 2003 Enforcement Initiative at 8.
[24] 2005 Lloyd Memo at 2.

deadlines pass, rather than allowing for yet another TSO with a lack of enforcement – commonplace even where effluent limits are not close to being met – to be assigned instead.[25]

There Is Little On-The-Ground-Enforcement Presence.

Of over 1,500 State and Regional Water Board staff, only a handful are on the ground identifying violations of water quality laws. As a result, the State Water Board's 2006 Enforcement Report found that "Water Board staff does not detect violations for several months after they occur."[26] Public Record Act requests, for example, found that in Region 2, well under 10% of industrial stormwater permittees are checked each 2-3 year review cycle; this is likely typical of many Regional Boards.

Increases in efficiencies from clearer permit requirements, as discussed above, will free up staff to spend more time in the field. Moreover, partners should be sought in other entities with enforcement authority. For example, Department of Fish and Game wardens have pollution authority under Fish and Game Code Section 5650 and are regularly in the field. Increased training for firefighters (who have hazardous waste responsibilities), building inspectors, and other government officials may provide assistance in enforcement of stormwater permits. Finally, improvements in development project review (EIRs) and auditing of municipal Jurisdictional Urban Runoff Management Plan (JURMP) annual reports for enforcement statistics will also help streamline municipal stormwater permit enforcement.

Fines and Penalties Fail to Address and Solve the Problem at Hand.

Table 8 of the State Board's 2006 Enforcement Report[27] lists violations and their follow-up actions. Of the listed NPDES permit violations that were actually identified, fully 86% statewide were left without a completed enforcement actions; 9% only received a letter, and just 7% had formal action taken. Indeed, the same report found that only 41% of violations requiring mandatory minimum penalties actually received those penalties.[28] In fact, many of the enforcement activities appear to be driven by MMPs, particularly where they are straightforward to calculate. As Table 8 indicates, more than that is rarely imposed. This "race to the bottom" process fails to target violations based on potentially more meaningful criteria, such as the seriousness of the impacts, and rarely results in relief other than MMPs (*e.g.*, few significant penalties or consent decrees with injunctive relief that will actually solve problems). Finally, again based on PRAs in Region 2, there is almost no effort to find non-filers, which is a particularly pervasive problem with under-regulated categories of discharges (as described above).

Two examples in San Diego illustrate the lack of enforcement activity and follow-up. The Hale Avenue Resource Recovery Facility (HARRF), owned by the City of Escondido, is permitted to discharge up to 16.5 MGD of treated wastewater directly into the Pacific Ocean. In December 2005, the Regional Board issued a complaint against the City of Escondido for more

[25] *See, e.g.*, Letter from Dr. Mark Gold, Heal the Bay to Jonathan Bishop, LA RWQCB (Aug. 28, 2006); Letter from Kirsten James and Dr. Mark Gold, Heal the Bay and Mati Waiya, Wishtoyo Foundation to Deborah Smith, LA RWQCB (June 6, 2007).
[26] 2006 Enforcement Report at 5.
[27] *Id.* at 13.
[28] *Id.* at 15.

than 400 violations of HARRF's discharge permits during 2004 and 2005. The complaint called for over $1 million in fines for these violations, which includes the EPA's Water Code minimum penalties for significant violators. In May 2006, the City proposed a settlement that a third of the penalties off the top, a proposal that ignored federal minimum penalties as well as other federally mandated liabilities. In October 2006, the Regional Board accepted the City's settlement with no changes or revisions. This is just one example of how a Regional Board's enforcement policies allow generous compromises in favor of significant violators of discharge permits and against the environment, which undermines the State's Water quality enforcement goals.

In another example, in 2003 a water main break on Harbor Drive in downtown San Diego discharged a significant amount of water which infiltrated through heavily contaminated soils located under the street and around the water main. This contaminated water filled with PCBs then discharged into the adjacent San Diego Bay waters, directly adjacent to a public walkway, the Maritime Museum, and a cruise ship terminal. (See enclosed photos.) The Maritime Museum had to be evacuated for the first time ever, due to the foul odors emitting from the contaminated water discharge into the Bay. Numerous agencies, including the City Water Authority, as well as Regional Water Board representatives evaluated and witnessed this illegal discharge (a violation of the City's stormwater permit), and worked together to fix the water main as well as analyze the damage done to the Bay waters. The Regional Board even collected samples from the contaminated area, and San Diego Coastkeeper wrote letters to the Regional Board demanding enforcement action. However, four years later, no enforcement action has been taken. The City of San Diego has numerous water main breaks per month – including 38 water main breaks and 12 sewage spills in January and February alone of this year. Water main breaks are a chronic problem around San Diego, and contributes to significantly polluted discharge into watersheds. Enforcement is essential to preventing further water main breaks and violations of stormwater permits from being similarly ignored.

Numerous other examples, many even more egregious, unfortunately abound throughout the state. Only a significant redirection of attention and commitment to enforcement through meaningful fines and penalties will begin to reverse this trend.

There Is No Reliable System for Staff, Decisionmakers or the Public to Track Enforcement Actions or Compliance Rates.

A March 2006 report by U.S. PIRG found that "[n]ationally, more than 3,700 major facilities (62%) exceeded their Clean Water Act permit limits at least once between July 1, 2003 and December 31, 2004" and that "[t]hese facilities often exceed their permits more than once and for more than one pollutant."[29] California, however, was one of only three states excluded from this report because it "failed to provide reliable data to EPA."[30] (There is no reason not to assume that, with reliable reporting, California would demonstrate similar compliance problems.) The State Board's August 2006 Enforcement Report similarly found that enforcement "data quality and completeness problems persist."

[29] U.S. PIRG, *Troubled Waters: An analysis of Clean Water Act Compliance, July 2003- December 2004*, http://www.uspirg.org/uploads/iN/ZM/iNZM2tGz4x7smwVULhTpow/troubledwaters06.pdf, Executive Summary (March 23, 2006).
[30] *Id.* at 9.

As noted in the September 15, 2006 CCKA letter to the State Water Board on enforcement, CIWQS,[31] which is the current vehicle for reporting enforcement activity, is a noble vision of integrated permit, compliance, enforcement and water quality reporting. However, as with its predecessors (WDS, SWIM1, SWIM2, WIN, etc.), CIWQS suffers from significant deficiencies that were recently examined by a panel of nationwide experts. As a result, the reliability of the State Board's 2006 Enforcement Report – which was due to the Legislature on January 1, 2006, but provided only after the Legislature requested it in August – is questionable at best. For example, Table 2 of the Enforcement Report indicates that violations of NPDES waste discharge requirements went down by 50% or more in four of the nine regions over the last year; this figure goes up to five of the nine regions if Region 8, in which violations reportedly dropped just under 50%, is included. With no reasonable level of confidence in the data, decisionmakers do not know whether to prioritize their enforcement dollars toward the seemingly "lower-performing" four regions, or conversely to spend the money doing a better job collecting violation information in the five regions that may be missing enforcement data.

A CIWQS report to the State Water Board at the Board meeting on June 5, 2007 confirmed that the CIWQS enforcement reporting system is largely nonfunctional as of today, and that numerous corrections need to be made before the system is reliably usable. Without regular, transparent, quality, and easily accessible data and reports from the State and Regional Water Boards, the public cannot hold its government accountable for implementing and enforcing state and federal water quality laws. Such information is also essential in order to prioritize use of limited funds for enforcement, as it will help target areas that need particular attention and save funds on areas that are doing well. Indeed, the State Board itself concluded in the 2006 Enforcement Report that "[t]he SWRCB should institute a 'Compliance Report Card' on the Internet to engage the public in a productive dialogue about discharger performance, environmental effects, Water Board workload, and Water Board performance." The State Board should insist on a reliable endpoint for when this type of basic information will be made available.

In addition, while there is at least some data on past enforcement activity, there is no real information available about pending enforcement actions, or what is being done about the violations that have no enforcement actions. The public should be able to see pending enforcement actions or specific violations that still need to be enforced. This will allow the public to track when actions are followed up on (as noted above, follow-up is relatively rare, but may improve if the public is observing).

One of the key recommendations in the Lloyd Memo was to "[m]easure compliance rates among all potential violators of water laws, filers and non-filers, and post information about violations and compliance rates on the Internet."[32] This recommendation was echoed by the Legislature and Governor in 2006, when they passed into law SB 729. This new law requires the State and Regional Boards to report rates of compliance with the requirements of Porter-Cologne; identify and post summary lists of all enforcement actions undertaken by the regional boards and the dispositions of those actions, including any fines assessed, on a quarterly basis; and provide to the public notice of any proposed and final administrative civil liability actions,

[31] California Integrated Water Quality System Project, http://www.swrcb.ca.gov/ciwqs/index.html.
[32] Lloyd Memo at 2.

including waivers of ACL hearings. Significant work remains to comply with these clear and essential directives.

* * *

The impacts of continued failure to enforce water quality laws are clear. Every listing of an impaired water body in the state is an example of a lack of enforcement, and the number of impaired waters is rising. California can afford no more delays in developing a meaningful enforcement program.

We appreciate the opportunity to provide these comments, and we look forward to working with you to set California on an enforcement path that will ensure clean water now and in the future.

Sincerely,

Linda Sheehan, Executive Director
California Coastkeeper Alliance
lsheehan@cacoastkeeper.org

David Beckman, Senior Attorney
NRDC
Dbeckman@nrdc.org

Dr. Mark Gold, Executive Director
Heal the Bay
mgold@healthebay.org

William F. "Zeke" Grader, Executive Director
Pacific Coast Federation of Fishermen's Associations
zgrader@ifrfish.org

Bill Jennings, Executive Director
California Sportfishing Protection Alliance
deltakeep@aol.com

Jim Metropulos, Legislative Representative
Sierra Club California
Metropulos@sierraclub-sac.org

Sujatha Jahagirdar, Clean Water Advocate
Environment California
Sujatha@environmentcalifornia.org

Enclosure 3 to February 2008 CCKA Enforcement Comments

San Francisco Chronicle, 2-7-08
"State EPA demands probe of sewage spills"

San Francisco Chronicle

State EPA demands probe of sewage spills

Marisa Lagos, Chronicle Staff Writer

Thursday, February 7, 2008

(02-06) 08:17 PST SACRAMENTO -- The chief of California's Environmental Protection Agency on Tuesday asked for an independent investigation into the regional state agency charged with regulating the Bay Area's water quality. The request came the same day that the San Francisco Bay Regional Water Quality Control Board announced that two sewage spills occurred in Marin County between Jan. 25 and Jan 31 - not just one, as the agency previously had reported. In announcing the second spill Tuesday, the board's executive director said it would ask for an independent review, and blamed the sewage treatment agency where the spill occurred for the delay. In a statement, Bruce Wolf said the Sewerage Agency of Southern Marin used an incorrect date when it told the regional board of the first spill, and did not estimate the amount of sewage spilled in its initial report.

The sewage agency has been under scrutiny since Friday, when authorities told the public that the agency's Mill Valley facility had released nearly 3 million gallons of treated and untreated sewage into Richardson Bay 20 hours prior. The delayed announcement angered many Bay Area residents and some local officials, and several days later, State Sen. Carol Migden announced she would investigate incident.

Then, on Tuesday, the Water Quality Control Board, which regulates these types of incidents, said there had been another spill of 2.5 million gallons of sewage on Jan. 25. The board blamed the sewage agency for an inaccurate initial report and said **staff at the regulating board didn't immediately notice when the report was corrected a few days later.**

In a letter to the Wolfe dated Tuesday, EPA secretary Linda Adams said the delay is "disturbing because of the potential environmental effects to the Bay through the lack of aggressive action."

Adams said it appears that the sewage agency is at fault for its failure to accurately report the Jan. 25 incident but that the water board was also remiss in failing to immediately investigate the incident.

"This is, in my opinion, a disservice to the citizens of the Bay Area and, therefore, unacceptable," Adams wrote.

She asked for a "thorough and independent investigation," to be completed within 60 days in addition to the investigation into the sewage agency, which is to be conducted by the regional water board.

E-mail Marisa Lagos at mlagos@sfchronicle.com.

http://sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/02/07/MNRJUT6RE.DTL

ATTACHMENT 2
CCKA COMMENT LETTER ON 2007 13385(o) REPORT
JANUARY 24, 2008

CALIFORNIA COASTKEEPER ALLIANCE
PO Box 3156, Fremont, CA 94539
(510) 770 9764 www.cacoastkeeper.org

January 24, 2008

Ms. Tam Doduc, Chair and Board Members
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814
Via Email: commentletters@waterboards.ca.gov

Re: February 5, 2008 Board Meeting, Agenda Item #6: "Consideration and Discussion of the California Water Code Section 13385 Enforcement Report"

Dear Chair Doduc and Board Members:

On behalf of the California Coastkeeper Alliance (CCKA), representing 12 Waterkeepers spanning the state from the Oregon border to San Diego,[33] we thank you for the opportunity to submit these comments on enforcement and enforcement reporting. As was discussed in more detail in our enforcement letters to the State Water Resources Control Board (State Board) dated June 2007 and November 2007 (attached and incorporated by reference), the issue of enforcement of environmental laws generally, and water quality laws in particular, has been the subject of at least two Cal/EPA directives in recent years, both of which highlighted the need for significant, specific improvements in enforcement at the State and Regional Water Board levels.[34]

We support the State Board's continued efforts to improve enforcement reporting, which is essential to improving enforcement overall. The data collection, compilation and reporting efforts undertaken to date, while still ongoing, have already shed light on a number of substantive enforcement concerns and questions that can be addressed while the reporting process continues to be refined. The 2007 13385(o) report raises a number of such issues, some of which are described in more detail below. We and the other Waterkeepers look forward to working with the State and Regional Boards to address these issues in the coming months, particularly with respect to the development of enforceable stormwater permits.

Our comments below are focused on three key areas: additional categories of enforcement information that should be included in the 13385(o) and baseline enforcement

[33] Klamath Riverkeeper, Humboldt Baykeeper, Russian Riverkeeper, San Francisco Baykeeper, Monterey Coastkeeper, San Luis Obispo Coastkeeper, Santa Barbara Channelkeeper, Ventura Coastkeeper, Santa Monica Baykeeper, Orange County Coastkeeper and Inland Empire Waterkeeper chapter, and San Diego Coastkeeper.
[34] Memorandum from Terry Tamminen, Secretary, Cal/EPA to BDOs, (November 30, 2004) ("Cal/EPA Enforcement Initiative"); Memorandum from Alan Lloyd, Secretary, Cal/EPA to Art Baggett, Chair, SWRCB, (March 23, 2005) (Lloyd Memo).

reports; continued issues with data quality and comprehensiveness; and development of specific recommendations for action based on the data that is available.

Categories of Enforcement Data That Should Be Added to the Report

There continue to be some significant omissions from the 13385(o) report that should be addressed in both the baseline enforcement report that the State Board is preparing as well as future 13385(o) reports. Specifically, as noted in our November 2007 letter, all water quality violations – both of state and federal law – should be collected and reported. Such reporting is essential to the success of other initiatives, such as the TMDL program. We support the report's reference to including groundwater and non-stormwater runoff violations in the future, but no timetable or plan of action is mentioned; these need to be specified.

Related to this issue is the definition of "enforcement," and what is left out of an enforcement report (or an enforcement program, for that matter) depending on the definition that is selected. For example, page 27 of the 13385(o) report states that the Water Boards plan to issue an annual enforcement report that "includes an analysis of . . . violation and enforcement data *for all of our regulatory programs* . . . ." (Emphasis added.) Yet in a number of cases, whole categories of pollution are being completely ignored by the Regional Boards (*i.e.* there is no "regulatory program" for these categories). This is an issue we have raised repeatedly over the years, and last year in particular.[35] If enforcement is limited to "enforcement where there is a regulatory program," rather than "enforcement where there is a violation of Porter-Cologne," such gaps will continue to be ignored. Enforcement, and enforcement reporting, must by law include any water quality violations, such as violations of Water Code Section 13260, which requires "[a]ny person discharging waste, or proposing to discharge waste, within any region that could affect the quality of the waters of the state [including groundwater]" to "file with the appropriate regional board a report of the discharge, containing the information which may be required by the regional board." Regardless of the lack of a formally-adopted program to oversee pollution, Water Code Sections 13260 *et seq*. make it clear that discharges that occur without required reporting and without associated, necessary waste discharge requirements violate the law. Those violations should be captured in the baseline enforcement report and any subsequent enforcement reports, to identify the problems that need to be addressed. If they are not being acted on, then that is something that must be noted publicly to ensure transparency and accountability.

[35] As just one example, there is abundant evidence that E. coli O157:H7 is a grazing-related problem that affects waters and growing areas in Region 3 – and that has killed several people and seriously injured hundreds. A June 2006 report prepared by that Regional Board found that numerous water bodies contaminated by O157:H7, where "any presence is considered exceedance of the water quality objective." (Emphasis added; *see* http://www.waterboards.ca.gov/centralcoast/TMDL/documents/SalRivFecColPrelimProjRptJuly06_000.pdf, pp. 26-27.) The report found that the "most frequent occurrence of E. coli O157:H7 occurs at sites flanking areas used for grazing purposes."[35] The report added that cattle (which abut a number of affected growing areas) are significant sources of O157:H7, that the strain can persist in the soil for 10-11 months after livestock have been removed, and that O157:H7 has been found near and downstream of livestock areas.[35] The Board concluded that "what is certain is that livestock are a source of … O157:H7" in the Central Coast region, and the "livestock have been observed roaming in surface waters as well as along riparian areas" of the area. Yet there continues to be no regulation of, and so no enforcement against, grazing activities, in violation of Porter-Cologne.

Similarly, the enforcement reports should include federal facilities. The argument that they should not be reported because enforcement is difficult against the federal government flies in the face of the fact that full disclosure on enforcement is essential to making changes that will make our waters cleaner. If the information somehow "skews" other statistics where the law (or the current interpretation of the law) may be different from other sources, then federal facilities could be reported on in a separate section. As we have commented to the State Board before, it is extremely powerful to say to the public that its federal government is allowed to pollute local waters essentially with impunity, and provide facts to back that up. That is the kind of information that the public can then take and use to change the law. Hiding the fact that federal facilities pollute will not make our waters any cleaner.

Another way in which the report impedes improvements in water quality is by not specifying which Regional Boards are doing well on data collection and reporting and on enforcement generally, and which need more improvement. Because of the problems with the quality of the data, it is unclear from the charts provided whether the Regions have a data problem, an enforcement problem, both, or neither. Concealing the fact that some Boards are performing better than others fails to reward those that are doing well and reduces the incentives on poorly performing Boards to do better. It also prevents those Regions that need help, financial or otherwise, from getting the help they need. To improve transparency and accountability overall, the baseline enforcement report and future versions of 13385(o) should include region-by-region enforcement analyses.

The Regional Boards should not be alone in being singled out for enforcement and reporting scrutiny. SB 729 provided the State Board with its own enforcement tools, to be used "after consulting with the regional board" to ensure that State Board action "will not duplicate the efforts of the regional board." The enforcement reports should include a section on State Board-initiated enforcement actions, which should include an explanation of the State Board's enforcement authority and when it has and will be used. If there are no State Board-initiated enforcement efforts, that figure should be reported so it can be tracked over time.

Issues with Data Quality and Comprehensiveness

Much has been said about the State and Regional Boards' ongoing struggles with enforcement data quality and comprehensiveness, and we support the fact that the report makes it clear that there are ongoing concerns that are being acted on. We also applaud the ongoing external review of the CIWQS data system and are active in that process. Because of concerns about the adequacy of the data, we will say little here about the actual results presented.[36] Our ongoing points are that: (a) the State and Regional Boards must institute as soon as possible a clear, quality-controlled process for entering enforcement data electronically, and (b) must complete and implement a basic online database that can generate quality reports that the public and decisionmakers can use to take action where there are identified enforcement problems. The current system does not yet allow such actions to be taken with full confidence in the data.

[36] However, even with data quality questions, some results beg for comment. For example, in Table 6: why are there only two NPDES stormwater violations in Region 2 recorded for 2007 and three in all of 2006? Or Table 12: two-thirds to 90% of facilities that require mandatory minimum penalties (MMPs) still have pending MMPs, eight years after the MMP program began? Such issues can and should be highlighted and investigated further.

Moreover, there are continuing concerns about the long-term sustainability of the database. U.S. EPA, which had provided some database funding in the past, has been clear in public testimony that they have serious concerns about California's management of its NPDES data. U.S. EPA is moving to a new web-based data system known as the Integrated Compliance Information System-NPDES (ICIS-NPDES). Assessment should be made of the relative merits of both CIWQS and ICIS-NPDES for reporting on NPDES violations, including assessment of funding streams for maintaining the systems over time, to ensure that staff time and other resources are best spent.

Analysis: Recommendations on Lessons Learned from Data

We appreciate and welcome changes to the 13385(o) report that begin to reflect some of the comments raised in our November 2007 letter on the 2006 report, particularly with regard to analyzing the data and providing some general recommendations for future action. The report would benefit, however, from additional, more specific recommendations in terms of action based on lessons learned, along with timetables, so that there is clear follow-through from the information collection and reporting process.

For example, there are numerous references in this report to relatively low enforcement rates resulting from a lack of staff. Many readers would wonder why increased enforcement and fines would not bring in more money for more staff to do more enforcement (after an initial investment in staff). In fact, CCKA and individual Waterkeepers researched this issue, and were told by a number of Regional Water Boards that since much of the fine and penalty money is re-routed to the State Board, there is a disincentive to increase costly enforcement that does not pay out with fines paid in-Region. When SB 729 (Simitian, Perata 2006) was first introduced in 2005, there was a provision to keep more fines in-Region, to increase this incentive for enforcement. However, this provision was removed as a result of State Board concerns that some of these fines needed to be deposited centrally and redistributed to support regions that had less of an opportunity to collect penalty money. Unfortunately, to date there has been no clear accounting of these funds to determine the extent to which the fines/penalties processing structure actually creates incentives or disincentives for enforcement. Given the serious state of the 2008-09 California budget, and the equally significant need for increased enforcement, a clear answer to this question is critical at the current time. We would ask the State Board, as a recommendation resulting from the findings of this 13385(o) report, to investigate and report on: (a) the total amount of fines and penalties assessed by Region over the last five years, (b) the amount of the fines that were kept in-Region, including through SEPs and other funds (and specifically addressing funds available to pay for enforcement staff), (c) the amount that went to the State Board (and into which funds), and (d) the amount reallocated out of Sacramento to Regional Boards (and where, how much, etc.). Tracking fines assessed with enforcement effort, as represented by the data in the 13385(o) report, would also be quite useful.

Another example of a finding that would benefit from a specific recommendation for follow-up is the oft-repeated fact that "staff is not routinely aware of violations for several months after they occur." This creates a lag in reporting, but more importantly it can reduce the effectiveness of enforcement taken months after the actual pollution incident. Ideally enforcement should occur as close as possible to the infraction, to maximize the disincentive to repeat the action in the future. The enforcement report accordingly should include a specific

recommendation on how the Boards will work to expedite a greater number of the enforcement actions taken.

Finally, the finding on page 16 with regard to stormwater versus other NPDES permits calls out particularly strongly for specific follow-up. This finding states that, unlike the numeric effluent limitations in the "vast majority" of wastewater NPDES permits, which are self-monitored and self-reported by the discharger,

> stormwater NPDES permits currently contain no numeric effluent limitations and instead rely upon a suite of general narrative effluent limitations, made specific by a plan that is only kept at the site. Compliance determination these effluent limitations at stormwater facilities therefore depends heavily on site visits . . . .

In other words, tracking enforcement of permits with numeric limits is far less staff intensive (and so less costly) than tracking enforcement with narrative limits, which need site visits. As articulated in the two Cal-EPA enforcement memos referenced above, this clearly points to a recommendation to increase use of numeric limits in stormwater permits in order to streamline both compliance and enforcement. Instead, the report on page 16 finds only that "[e]nsuring compliance with stormwater NPDES permit effluent limitations . . . requires a large field presence," a recommendation that seems unlikely to be implemented in the current budget climate. We ask that the report include a recommendation for numeric limits in stormwater permits to address this issue.

* * *

The development and distribution of enforcement reports is an essential, ongoing check on the California's progress in taking action to achieve cleaner water. Transparency in enforcement will ensure that good actors are rewarded, problems are identified and fixed, and the public enjoys healthy waterways. Thank you for the opportunity to comment on the 2007 report of enforcement efforts.

Regards,

Linda Sheehan
Executive Director

enclosure

Enclosure to CCKA Comments on 2007 13385(o) Report

"CCKA Comment Letter on 2006 13385(o) Report"
October 31, 2007

CALIFORNIA COASTKEEPER ALLIANCE
PO Box 3156, Fremont, CA 94539
(510) 770 9764 www.cacoastkeeper.org

October 31, 2007

Ms. Tam Doduc, Chair and Board Members
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814
Via Email: commentletters@waterboards.ca.gov

Re: November 6, 2007 Board Meeting, Agenda Item #4: "Consideration and Discussion of the Water Code Section 13385 Enforcement Report"

Dear Chair Doduc and Board Members:

On behalf of the California Coastkeeper Alliance (CCKA), representing 12 Waterkeepers spanning the state from the Oregon border to San Diego,[37] we thank you for the opportunity to submit these initial comments pertaining to the above-described item on enforcement and enforcement reporting. As was discussed in more detail in our letter to the State Water Resources Control Board (State Board) dated June 2007 (attached), the issue of enforcement of environmental laws generally, and water quality laws in particular, has been the subject of at least two Cal/EPA directives in recent years, both of which highlighted the need for significant, specific improvements in enforcement at the State and Regional Water Board levels.[38]

Comprehensive, accurate enforcement reporting is a critical tool in both tracking and improving compliance with state and federal water laws. The Legislature recognized this in requiring the annual Section 13385 enforcement report that is the focus of this agenda item, and in enacting additional reporting requirements in SB 729 (Simitian and Perata, 2006). Full implementation of these reporting mandates should support regular, thoughtful, and complete examination of enforcement efforts annually, and prompt changes in enforcement focus and resources as needed to improve water quality throughout the state. However, as indicated by the Draft 2007 13385(o) Enforcement Report, California has a significant amount of work to do to meet these mandates. We request that the Board: (a) review and reassess the information and analysis presented in the Draft Report, (b) make improvements as possible now, (c) identify the gaps that would need to be filled to comply fully with Section 13385 and SB 729 and to establish a sound foundation against which future enforcement progress can be assessed, and (d) describe how those gaps will be filled and how the necessary resources will be identified and sought.

[37] Klamath Riverkeeper, Humboldt Baykeeper, Russian Riverkeeper, San Francisco Baykeeper, Monterey Coastkeeper, San Luis Obispo Coastkeeper, Santa Barbara Channelkeeper, Ventura Coastkeeper, Santa Monica Baykeeper, Orange County Coastkeeper and Inland Empire Waterkeeper chapter, and San Diego Coastkeeper.
[38] Memorandum from Terry Tamminen, Secretary, Cal/EPA to BDOs, (November 30, 2004) ("Cal/EPA Enforcement Initiative"); Memorandum from Alan Lloyd, Secretary, Cal/EPA to Art Baggett, Chair, SWRCB, (March 23, 2005) (Lloyd Memo).

As noted in the Draft Enforcement Report, Water Code Section 13385(o) requires the State Board to "continuously report and update information on its Internet Web site, but at a minimum, annually on or before January 1, regarding its enforcement activities. The information shall include all of the following:

> (1) A compilation of the number of violations of waste discharge requirements in the previous calendar year, including stormwater enforcement violations.
> (2) A record of the formal and informal compliance and enforcement actions taken for each violation, including stormwater enforcement actions.
> (3) An analysis of the effectiveness of current enforcement policies, including mandatory minimum penalties."

In addition, SB 729 requires the Regional Boards to:

- "Report rates of compliance with the requirements of [Porter-Cologne]."[39]
- "In consultation with the state board, identify and post on the Internet a summary list of all enforcement actions undertaken by that regional board and the dispositions of those actions, including any fines assessed. This list shall be updated quarterly."[40]
- "Ma[k]e available to the public by means of the Internet" any "[i]nformation relating to [administrative civil liability] hearing waivers and the imposition of administrative civil liability, as proposed to be imposed and as finally imposed."[41]

The Legislature's continued focus on enforcement reporting reflects a larger concern about the deteriorating quality of the state's waters despite billions in bond funds spent to restore them, and a desire for increased transparency in efforts to redress this problem. The Draft Enforcement Report and the State Board's enforcement reporting efforts overall do make strides toward meeting the above requirements. However, the State and Regional Boards have yet to meet the SB 729 requirements, and there is no discussion in the Draft Enforcement Report of when or how they will be addressed. Moreover, the Draft Enforcement Report lacks the thoughtful analysis of the actual "effectiveness of current enforcement policies" called for by Section 13385(o), analysis that is essential to making sure that the regulated community improves its compliance with water laws.

These are not academic observations. The State and Regional Boards cannot analyze the success of enforcement efforts in achieving clean water, as is required in Section 13385(o), without a hard look at the goals of enforcement reporting, as well as the opportunities and limitations provided by the current data collection systems. The Draft Enforcement Report does not take this hard look. Rather, it raises many new questions that should be addressed if the State and Regional Boards are to effectively improve their enforcement – and enforcement reporting – programs.

[39] Water Code § 13225(e).
[40] Water Code § 13225(k).
[41] Water Code § 13323(e).

Just a few of the questions raised by the Draft Report that should be answered in a subsequent version are the following:

- Other than statutory mandates, what is the purpose of gathering enforcement data? For example, the Draft Enforcement Report states that the regions stopped reporting violation data for federal facilities "because of their inability to enforce" many of the violations. Is enforcement data only reported for those violations that can be enforced? If so, what of those regions that assert a lack of sufficient PYs for meaningful enforcement – would that assertion support a cessation of enforcement data collection? And if not, then what is the purpose of collecting the data? Couldn't an argument be made that a comprehensive database of federal violations would be critical in supporting a change in any current exemptions for federal facilities, thereby improving water quality in the future?
- What are the sources of the violation information (self-reporting, inspections, etc.)? How certain is the State Board that the total number of violations reported approximates the actual total number of violations? For example, the extremely low number of reported stormwater violations (*e.g.*, one violation reported in Region 2 for all of 2006) begs the question of what the actual total number of violations is, and how the regions will determine that number. What would need to be done to gain more certainty in this respect and ensure that all violations are captured, or at least estimated with some level of accuracy (*e.g.*, through intensive inspection efforts in randomly selected locations)?
- Is the violation information primarily from self-reporting, as seems to be the case, or does it include a meaningful amount of inspection data? What is the breakdown of self-reported data versus inspection data? Do inspections capture proportionately more violations than self-reporting? If so, would that information allow the reported violation figure to be adjusted upwards to reflect a more accurate estimate of actual violations? Also, does this data (if available) inform the weight that the agencies should give to self-reporting versus inspections in improving enforcement?
- How does the State Board capture and report violations that are known through avenues other than self-reporting or inspections – *e.g.*, discharges into Areas of Special Biological Significance, which are prohibited without a special, approved exemption that should be on file?
- How do Regional Board differences in permit writing processes impact the number of violations reported for each region? As one example, some Regional Board permit writers draft long compliance schedules into NPDES permits that allow for enforcement to be avoided altogether (*see* CCKA's comments on this issue to the State Board dated October 19, 2006). How can enforcement data shed light on this problem and ensure that permit writers do not conduct actions that avoid needed enforcement, a reform that was called for by both Secretary Tamminen and Secretary Lloyd?
- How does compliance vary with the clarity of the permit requirements? How can this information be best captured and reported?
- How and where are the State Board's enforcement actions (as established by SB 729) recorded?
- What levels of fines and penalties are assessed by region (something also called for by SB 729)? Is there some enforcement direction that can be ascertained by the amount of fines versus the level of compliance?
- Do fines and penalties capture the economic benefit of noncompliance? How will this be determined?

- Do some regions assign monetary assessments primarily for SEPs? If so, how does compliance differ as compared with those regions that assess fines that do not go to SEPs?
- What exactly is the process for addressing the data accuracy problems identified by the CIWQS panel? What are the timelines and milestones for ensuring that the data being put up online are accurate?
- What exactly is the process for identifying and addressing the asserted lack of PYs for full enforcement? What is the need, and what are the suggestions on how that need might be addressed? *E.g*., increased fees on dischargers? Higher penalties? How can better enforcement data by region support a BCP request for additional PYs, and how will that data be collected and presented in a meaningful way?

Additional questions can and should be asked as this Report is finalized, and as the State Board responds to the recommendations of the CIWQS review panel and better establishes the direction of its data collection and reporting effort.

Finally, we strongly support the Report's recommendation that <u>all</u> water quality violations – both of state and federal law – should be collected and reported. Such reporting is essential to the success of other initiatives, such as the TMDL program. More broadly, and is critical to achieving clean water throughout the state by ensuring that all pollution – regardless of how characterized – is addressed. This reporting must include violations of Section 13260, which requires "[a]ny person discharging waste, or proposing to discharge waste, within any region that could affect the quality of the waters of the state [including groundwater]" to "file with the appropriate regional board a report of the discharge, containing the information which may be required by the regional board." Many discharges of polluted runoff and discharges to groundwater in the state occur completely without regulation or oversight by the State or Regional Boards. Regardless of the lack of a formally adopted program to oversee such pollution, Sections 13260 *et seq*. make it clear that discharges that occur without required reporting and without necessary waste discharge requirements violate the law. Those violations should be reflected clearly, online, to identify the problems that need to be addressed.

Transparency in enforcement processes, in enforcement direction, and in desired versus actual results will ensure that needed changes are made over time. Such transparency also will provide the certainty to the regulated community that is needed for higher levels of compliance – and, most importantly, cleaner water. We look forward to working with you to achieving clean water through comprehensive and transparent enforcement of state and federal water quality laws. Thank you.

Regards,

Linda Sheehan
Executive Director

Water: Public vs. Polluters
Los Angeles Times (1886-Current File); Feb 12, 1969; ProQuest Historical Newspapers Los Angeles Times (1881 - 1985) pg. E8

Water: Public vs. Polluters

ISSUE: Will the Legislature pay more attention to industry or the public in drafting new laws to prevent water pollution?

The oil drilling disaster off Santa Barbara has overshadowed the other very serious pollution threats to the water resources of California.

For years inadequate laws have left the state's shoreline and harbors, rivers and lakes highly vulnerable to the discharge of wastes. Industrial, governmental and agricultural polluters, as a result, have made sewers out of once-clean waterways.

There was hope, therefore, that a special committee appointed to recommend revisions in the present anti-pollution statutes would come up with a strong series of reforms.

Unfortunately, the committee wrote a report that often is more timid than tough.

The people of California will be the losers if the Legislature does not improve upon the weaknesses in the committee's recommendations. Lawmakers, indeed, dare not ignore the public's ever-increasing concern with the quality of the environment.

This state has made extraordinary progress in providing enough water for the needs of its growing population. But as Chief Dep. Atty. Gen. Charles O'Brien told the State Water Resources Control Board last week:

"Now that we have the water for our present needs, we must insure that we can continue to drink this water, swim in it, fish in it, use it industrially, agriculturally —and recreationally."

Discharge of wastes, moreover, can be a reasonable, limited use of the state's water resources—if such activity is carefully controlled and does not take priority over more important beneficial uses.

The Times believes there are at least four important deficiencies in the committee report that legislators should correct.

First, the report ignores the ridiculous, built-in conflict of interest on Regional Water Quality Control Boards. By law, five of the seven seats are given to spokesmen for industrial, governmental, agricultural or utility users. Only one representative of the public at large is authorized, along with a delegate from fish and game interests.

The Los Angeles regional board, for instance, has as one of its members an employe of an oil company that is considered one of the principal offenders in the pollution of the Dominguez Channel and Los Angeles Inner Harbor.

The public should be further protected by restoring to the Attorney General's office the power to initiate legal action against polluters independently of the state or regional boards.

And although the committee proposed civil penalties for pollution, the amount is far too small. The suggested penalty of $6,000 per month, said O'Brien, "seems more like a cost of doing business than a deterrent."

Finally, the anti-pollution laws must be clarified to limit the possibility of delaying legal tactics by violators to the detriment of the public interest.

California has seen a horrible example of how its shoreline can be spoiled by pollution. We must have the strongest possible laws to protect all of our water resources.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, CA 94105-3901

Ms. Dorothy Rice, Executive Director
California State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812

Mr. Bruce H. Wolfe, Executive Officer
Regional Water Quality Control Board
San Francisco Bay Region
1515 Clay Street, Suite 1400
Oakland, CA 94612

Ms. Tracy Egoscue, Executive Officer
Regional Water Quality Control Board
Los Angeles Region
320 West 4th Street, Suite 200
Los Angeles, CA 90013

Ms. Pamela C. Creedon, Executive Officer
Regional Water Quality Control Board
Central Valley Region, Sacramento Office
11020 Sun Center Drive #200
Rancho Cordova, CA 95670

Dear Ms. Rice, Egoscue, Creedon, and Mr. Wolfe:

To satisfy a commitment we made in a settlement agreement with Baykeeper, Humboldt Baykeeper, Ecological Rights Foundation, and Communities for a Better Environment, the Environmental Protection Agency reviewed twelve randomly chosen National Pollutant Discharge Elimination System (NPDES) permits issued by Regional Boards 2, 4 and 5, focusing solely on provisions in those permits regarding schedules of compliance to achieve water quality-based effluent limitations.

In the settlement agreement, EPA agreed to provide a written report setting forth the results of its review, and to make that report available to the plaintiffs, State Board, all Regional Boards, and any other interested persons upon request. A copy of that report is attached to this letter.

We recommend changes to strengthen compliance schedules included in California NPDES permits issued by the Regional Boards. Specifically, permits, and/or the

administrative records for the permits, need to include explanations why compliance schedules are "appropriate" and how they provide for achieving compliance with the permits' final effluent limitations "as soon as possible," as required by EPA regulations at 40 CFR § 122.47. We are encouraged that the State Board has made significant progress in standardizing the State's approach to issuing compliance schedules in NDPES permits in drafting a Statewide compliance schedule-authorizing policy that may be released for public comment in the near future. Additionally, we appreciate the State Board's oversight efforts in this area and look forward to the benefits such oversight is likely to bring. Through these and similar efforts by the State and Regional Boards, which EPA will make every effort to support, we are confident that the use of compliance schedules and the inclusion of appropriate supporting material in future California NPDES permits and fact sheets can be fully consistent with the requirements of the Clean Water Act and EPA's regulations.

We look forward to working with you on these matters. If you have any questions regarding this report, please call me at (415) 972-3572 or Doug Eberhardt at (415) 972-3420, or refer legal staff to Suzette Leith at (415) 972-3884.

Sincerely yours,

Alexis Strauss 31 Oct. 2007
Director, Water Division

cc:
M. Lauffer, SWRCB
Executive Officers, RWQCB 1, 3, 6-9
Christopher Sproul, Environmental Advocates

Enclosure: California Permit Quality Review for Compliance Schedules

California Permit Quality Review Report on Compliance Schedules

October 31, 2007

U.S. Environmental Protection Agency
Region IX

in cooperation with Office of Water

CALIFORNIA PERMIT QUALITY REVIEW REPORT ON COMPLIANCE SCHEDULES

October 31, 2007

I. Introduction

Pursuant to the terms of a settlement agreement, dated June 7, 2007, between EPA and Baykeeper, Humboldt Baykeeper, Ecological Rights Foundation, and Communities for a Better Environment (collectively referred to as "Plaintiffs"), EPA reviewed a random selection of twelve (12) permits issued by Regional Board 2, Regional Board 4 and Regional Board 5 in the State of California. These permits were all issued between 2004 and February 28, 2007, and each included at least one compliance schedule. The random selection of these permits occurred on July 16, 2007, before interested parties (including a representative of the Plaintiffs). EPA reviewed each of these permits and addressed in writing the five issues specified in the settlement agreement. The results of this review are set forth below.

A. Settlement Agreement

According to the terms of the settlement agreement, EPA agreed to "address in writing the following issues as to each compliance schedule in each permit" as part of a permit review:

(a) whether the permit and/or administrative record justifies the compliance schedule "as appropriate" as required by 40 C.F.R. §122.47(a);

(b) whether the permit and/or administrative record justifies whether the compliance schedule requires compliance with the final water quality-based effluent limitation as soon as possible, as required by 40 C.F.R. § 122.47(a)(1);

(c) whether, as part of the compliance schedule, the permit contains enforceable interim requirements and dates for their achievement as required by 40 C.F.R. § 122.47(a)(3) and section 502(17) of the CWA, 33 U.S.C. § 1362(17);

(d) whether the permit contains an appropriate final effluent limitation as required by section 301(b)(1)(C) of the CWA, 33 U.S.C. § 1311(b)(1)(C), and 40 C.F.R. §§ 122.2 (definition of "schedule of compliance"), 122.44(d)(1)(vii); and

(e) whether the compliance schedule inappropriately includes time solely to develop a Total Maximum Daily Load, site specific objective/criterion, and/or a Use Attainability Analysis and therefore is not consistent with sections 301(b)(1)(C) and 502(17) of the CWA, 33 U.S.C. §§ 1311(b)(1)(C) and 1362(17) and 40 C.F.R. §§ 122.2 (definition of "schedule of compliance") and 122.47.

Additionally, EPA agreed to prepare a written report setting forth the results of the permit review and to make such report available by September 30, 2007 to the Plaintiffs, the State Board, all Regional Boards and any other interested persons upon request. Plaintiffs subsequently agreed to an extension of this deadline until October 31, 2007.

B. Permits Reviewed

- **EPA reviewed 6 permits and each of their compliance schedules in Regional Board 2** (San Francisco Bay Region): City of Petaluma; City of American Canyon; Rodeo Sanitary District; US Navy Naval Support Activity Treasure Island; Rhodia-Martinez Plant; Tesoro Refining & Marketing Company, Golden Eagle Refinery.
- **EPA reviewed 3 permits and each of their compliance schedules in Regional Board 4** (Los Angeles Region): Los Angeles County Sanitation Districts, Pomona WWWRP; Los Angeles County Sanitation Districts, San Jose Creek WWRP; Metropolitan Water District of Southern California, Rio Hondo Power Plant.
- **EPA reviewed 3 permits and each of their compliance schedules in Regional Board 5** (Central Valley Region): City of Live Oak; Olivehurst PUD; Placer County Facility Services, Placer County SMD No 1.

II. Results of the California Permit Review

Pursuant to the settlement agreement, EPA reviewed each of the compliance schedules in each of the twelve randomly selected permits and addressed the five issues identified in subsections (a) to (e) below. The twelve permits contained a total of 59 individual parameter-specific compliance schedules, covering 23 different pollutants.[1] EPA's permit review was further informed by the relevant provisions of the Clean Water Act, EPA regulations, and the Memorandum from the Director of the Office of Wastewater Management (OWM) to the Director of EPA Region 9's Water Division, dated May 10, 2007, attached to this document.

(a) Permit and/or administrative record justifies the compliance schedule "as appropriate" as required by 40 C.F.R. § 122.47(a).

None of the twelve permits reviewed, or their supporting administrative records, adequately explained why any of the compliance schedules in those permits was "appropriate." Absent an adequate discussion of the "appropriateness" of the compliance

[1] Some of the permits issued by Regional Board 2 included in the permit findings a determination that there was reasonable potential for the discharge of dioxin TEQ to cause or contribute to an excursion above the water quality standard, but did not include either a final or interim effluent limit for this parameter. Accordingly, it appears that the discharger in each of these cases was given a de facto compliance schedule without an applicable interim or final water quality-based effluent limit. These de facto compliance schedules are reflected in the total number of parameter specific compliance schedules identified in this paragraph.

schedules in light of the factors identified in Paragraphs 6, 7 and 8 of the May 10, 2007 memorandum, or any other potentially relevant factors, EPA is unable to conclude that any of the reviewed compliance schedules was "appropriate" at the time of issuance.

As best as EPA could determine, many of the compliance schedules were granted based solely on an analysis of effluent data showing past performance above the limits calculated for the new permit. While EPA agrees that past performance can be a relevant factor in determining whether a compliance schedule is "appropriate," it is not necessarily the only relevant factor. Without an analysis of other relevant factors, e.g., whether there is a need for modifications to treatment facilities, operations, or other measures to meet the new WQBEL, EPA does not have an adequate basis in these permit records to conclude that such compliance schedules are "appropriate."

For some of the permits, EPA's analysis of the administrative records indicated that a compliance schedule was not "appropriate," even though there may have been some past exceedences of the WQBELs calculated for the new permit. In those permits, the record contained information indicating that the facility had already implemented controls sufficient to achieve the new or revised WQBEL, as well as effluent data indicating that, at the time of permit issuance, the permittee was able to discharge at or below the final limits calculated for the new permit. Compliance schedules are intended to provide a discharger the time it needs to take the necessary steps to construct additional treatment systems or implement other changes so that it can meet a new or more stringent WQBEL. When such steps have already occurred such that the discharger at the time of permit issuance is able to meet the new or revised WQBEL, a compliance schedule is not appropriate.

(b) Permit and/or administrative record justifies whether the compliance schedule requires compliance with the final water quality-based effluent limitation "as soon as possible," as required by 40 CFR § 122.47(a)(1).

None of the twelve permits and/or administrative records reviewed contained a specific finding that their compliance schedules required compliance with the final WQBEL "as soon as possible." Nor did any of them contain an adequate justification for the specific length of the compliance schedule. As best as EPA could determine, in all but one of the twelve permits, the compliance schedules were set at the maximum length permitted under the applicable compliance schedule authorizing provision, without documentation in the permit and/or administrative record demonstrating that this length of time was "as soon as possible." Without such documentation, EPA was unable to determine for these permits whether the schedules chosen were "as soon as possible," or whether the maximum length available under the State's authorizing provision was simply applied as a default. Although one permit included a compliance schedule of two years duration that was shorter than the maximum allowed by the authorizing provision, EPA was unable to determine whether this was "as soon as possible" given the absence of a supporting justification in the permit and/or administrative record.

Additionally, as discussed above, some of the permit records contained effluent data indicating that, at the time of permit issuance, the permittee was able to discharge at or below the final limits calculated for the new permit. In each of those cases, a compliance schedule was neither "appropriate" (as discussed above) nor established to provide for compliance with the final effluent limitation "as soon as possible."

(c) As part of the compliance schedule, the permit contains enforceable interim requirements and dates for their achievement as required by 40 CFR 122.47(a)(3) and section 502(17) of the CWA, 33 USC § 1362(17).

The CWA and its implementing regulations define a compliance schedule as an "enforceable sequence of actions or operations leading to compliance with an effluent limitation...." EPA regulations at 40 CFR § 122.47(b)(3) require any compliance schedule longer than a year to "set forth interim requirements and the dates for their achievement." The regulation includes a note giving examples of interim requirements such as (a) submit a construction grant application, (b) let a construction contract, (c) commence construction, or (d) complete construction of required facilities.

Most of the compliance schedules reviewed included interim steps of some type. For example, nearly all of the compliance schedules included requirements for annual or semi-annual reports, and most of the permits included other tasks such as the performance of studies and/or the development and implementation of Pollution Minimization Plans (PMPs). In addition, most of the permits contained enforceable interim numeric effluent limitations effective during the compliance schedule's term. Interim numeric limits, while highly desirable, were often established in these permits at a level currently being achieved by the discharger at time of permit issuance. EPA was unable to conclude that the mere inclusion of such interim limits in these permits, without more explanation in the record than provided here, would lead to compliance with the final WQBEL. Similarly, while the inclusion of PMPs in a compliance schedule is appropriate and desirable, the inclusion of PMPs by itself does not necessarily lead to the achievement of final limits. For example, the PMPs in some of the permits reviewed appeared to contemplate simply the continued implementation of generic pollutant minimization or pretreatment measures that had been specified in prior permits, without any accompanying demonstration that there was a sequence of actions intended to achieve compliance with the WQBEL in the new permit. Moreover, the stated goal of the Pollutant Minimization Plans in certain permits was merely to "reduce" loadings of pollutants; it was unclear whether such plans, when implemented, would likely attain the WQBEL.

Among the permits reviewed, a frequent practice was to require the permittee to conduct studies designed to evaluate the sources of the pollutants, develop a source control plan or treatment measures necessary to achieve the WQBELs, and (in some permits) implement the measures developed in the plan. At one end of the spectrum, some compliance schedules reviewed by EPA had a clear sequence of steps with the final step being compliance with a final WQBEL, had specific enforceable dates for each step, and included implementation of the measures identified in the studies as one or more of the interim steps. At the other end of the spectrum, some of the permits appeared to

contain only the continued implementation of generic pollutant minimization measures carried over from the prior permit, in addition to numeric interim limits, with no explanation of how these measures would lead to compliance with the final WQBEL. Some permits included a clear sequence of steps, but did not include dates for the steps. Others required development of a plan to achieve the WQBELs, but did not include a step requiring implementation of the plan. Whether the interim requirements include construction, treatment process, operating process, or pollution prevention milestones, or simply relate to the development and implementation of a plan, the permit findings or fact sheet should demonstrate that such steps constitute an enforceable "sequence" of actions "leading to compliance" with the final WQBEL. The permits and administrative records reviewed generally did not contain such a demonstration; hence, EPA was unable to determine whether the interim steps would lead to compliance with the final WQBEL, as required by EPA's regulations and section 501(17) of the CWA.

(d) Permit contains an appropriate final effluent limitation as required by section 301(b)(1)(C) of the CWA.

EPA reviewed all twelve permits to determine whether the compliance schedule contained final water quality based effluent limits for the parameters covered in the compliance schedule. [2]

Of the 59 compliance schedules reviewed, 40 included numeric final water quality based effluent limitations in the enforceable permit provisions and thus satisfied this element. One compliance schedule included a non-numeric final effluent limitation in the enforceable permit provisions; this compliance schedule is discussed below in the last paragraph of this section.

In 18 of the 59 compliance schedules, there was no final effluent limitation included in the associated enforceable permit provisions.

In five of the Regional Board 2 permits, there was at least one compliance schedule that did not include a specific final effluent limitation. Instead, for these compliance schedules, there was a statement in the permit findings that the final effluent limitation would be the wasteload allocation to be derived in an upcoming TMDL or in a site-specific objective (SSO). For the reasons set forth in EPA's October 23, 2006, letter to the California State Water Resources Control Board referenced in the attached May 10, 2007 Memorandum, EPA does not consider this to be an appropriate expression of a final effluent limitation. This issue did not arise in any of the Regional Board 4 or 5 permits.

One Regional Board 2 permit included a final limit dependent on the adoption of a TMDL. It also anticipated the possibility that the TMDL would not be completed prior to the end of the compliance schedule and identified an alternative final WQBEL. It defined the final WQBEL as either "the wasteload allocation to be derived in an

[2] EPA did not analyze whether any specific numeric limit "derives from and complies with all applicable water quality standards" per 40 CFR § 122.44(d)(1)(vii)(A) because this is beyond the scope of this compliance schedule review.

upcoming TMDL, or no net loading." The permit said that "no net loading" required that the discharge of pollutants must be offset. Although "no net loading" may in certain circumstances be an appropriate final WQBEL, this compliance schedule inappropriately appeared to include time solely for development of the TMDL before requiring the permittee to comply with interim steps leading to compliance with the "no net loading" alternative limit, as discussed in (e) below. Moreover, neither the permit nor the administrative record explained how the compliance schedule would achieve compliance with the alternative limit "as soon as possible."

(e) The compliance schedule inappropriately includes time solely to develop a TMDL, site specific objective (criterion), or use attainability analysis.

A compliance schedule based solely on time needed to develop a TMDL, site specific criterion, or a use attainability analysis is not appropriate. None of the three permits reviewed from Regional Board 5 referenced any TMDL, SSO, or UAA in connection with the length of their compliance schedules. Among the Regional Board 4 permits, two, similarly, did not reference any TMDL, SSO or UAA in connection with the compliance schedule provisions. However, the third Regional Board 4 permit gave the permittee the option of conducting studies leading to development of an SSO. Because this permit did not contain specific actions or tasks leading to compliance with the WQBEL, it was difficult to tell whether this permit included time solely to allow for SSO development.

Each of the six permits from Regional Board 2 contained at least one compliance schedule that relied on the time needed for development of TMDLs or SSOs in allowing permittees time to comply with the final WQBELs. These fell into three categories:

For some of the compliance schedules, the final effluent limitation was expressed as the wasteload allocation to be derived from an upcoming TMDL or SSO, and no rationale was given for the length of the compliance schedule. Given the absence of other explanations for the schedules' length in the permit or administrative record, it appeared that these compliance schedules were included to allow time solely to develop the TMDL or SSO.

The second category involved compliance schedules accompanied by the specific statement, "For pollutants where there are planned TMDLs or SSOs, and final WQBELs may be affected by those TMDLs and SSOs, maximum timeframes may be appropriate due to the uncertain length of time it takes to develop the TMDL/SSO." This language suggests that the compliance schedule inappropriately included time solely to develop a TMDL or SSO.

Finally, some of the Regional Board 2 permits reviewed contained final WQBELs (either numeric limitations, or, in the permit described at the end of (d), above, "no net loading"), but contained compliance schedules that provided an initial period of time solely to allow for development of a TMDL or SSO. These permits did not require the permittee to develop and implement a plan to comply with the final WQBEL unless the

TMDL or SSO was not developed by a date certain. As stated above, it is not appropriate for a compliance schedule to include time solely for the development of a TMDL or SSO.

Attachment: Memorandum from the Director of the Office of Wastewater Management (OWM) to the Director of EPA Region 9's Water Division, May 10, 2007

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAY 10 2007

OFFICE OF WATER

MEMORANDUM

SUBJECT: Compliance Schedules for Water Quality-Based Effluent Limitations in NPDES Permits

FROM: James A. Hanlon, Director
Office of Wastewater Management

TO: Alexis Strauss, Director
Water Division
EPA Region 9

Recently, in discussions with Region 9, questions have been raised concerning the use of compliance schedules in National Pollutant Discharge Elimination System (NPDES) permits consistent with the Clean Water Act (CWA) and its implementing regulations at 40 C.F.R. § 122.47. The use of compliance schedules in NPDES permits is also the subject of ongoing litigation in California. The purpose of this memo is to provide a framework for the review of permits consistent with the CWA and its implementing regulations.

When may a permitting authority include a compliance schedule in a permit for the purpose of achieving a water quality-based effluent limitation?

In *In The Matter of Star-Kist Caribe, Inc.*, 3 E.A.D. 172, 175, 177 (1990), the EPA Administrator interpreted section 301(b)(1)(C) of the CWA to mean that 1) after July 1, 1977, permits must require immediate compliance with (*i.e.*, may not contain compliance schedules for) effluent limitations based on water quality standards adopted before July 1, 1977, and 2) compliance schedules are allowed for effluent limitations based on standards adopted after that date only if the State has clearly indicated in its water quality standards or implementing regulations that it intends to allow them.

What principles are applicable to assessing whether a compliance schedule for achieving a water quality-based effluent limitation is consistent with the CWA and its implementing regulations?

1. "When appropriate," NPDES permits may include "a schedule of compliance leading to compliance with CWA and regulations . . . as soon as possible, but not later than the applicable statutory deadline under the CWA." 40 C.F.R. § 122.47(a)(1). Compliance schedules that are longer than one year in duration must set forth interim requirements and dates for their achievement. 40 C.F.R. § 122.47(a)(3).

2. Any compliance schedule contained in an NPDES permit must be an "enforceable sequence of actions or operations leading to compliance with a [water quality-based] effluent limitation ["WQBEL"]" as required by the definition of "schedule of compliance" in section 502(17) of the CWA. *See also* 40 C.F.R. § 122.2 (definition of schedule of compliance).

3. Any compliance schedule contained in an NPDES permit must include an enforceable final effluent limitation and a date for its achievement that is within the timeframe allowed by the applicable state or federal law provision authorizing compliance schedules as required by CWA sections 301(b)(1)(C); 502(17); the Administrator's decision in *Star-Kist Caribe, Inc.* 3 E.A.D. 172, 175, 177-178 (1990); and EPA regulations at 40 C.F.R. §§ 122.2, 122.44(d) and 122.44(d)(1)(vii)(A).

4. Any compliance schedule that extends past the expiration date of a permit must include the final effluent limitations in the permit in order to ensure enforceability of the compliance schedule as required by CWA section 502(17) and 40 C.F.R. § 122.2 (definition of schedule of compliance).

5. In order to grant a compliance schedule in an NPDES permit, the permitting authority has to make a reasonable finding, adequately supported by the administrative record, that the compliance schedule "will lead[ ] to compliance with an effluent limitation . . . " "to meet water quality standards" by the end of the compliance schedule as required by sections 301(b)(1)(C) and 502(17) of the CWA. *See also* 40 C.F.R. §§ 122.2, 122.44(d)(1)(vii)(A).

6. In order to grant a compliance schedule in an NPDES permit, the permitting authority has to make a reasonable finding, adequately supported by the administrative record and described in the fact sheet (40 C.F.R. § 124.8), that a compliance schedule is "appropriate" and that compliance with the final WQBEL is required "as soon as possible." *See* 40 C.F.R. §§ 122.47(a), 122.47(a)(1).

7. In order to grant a compliance schedule in an NPDES permit, the permitting authority has to make a reasonable finding, adequately supported by the administrative record, that the discharger cannot immediately comply with the WQBEL upon the effective date of the permit. 40 C.F.R. §§ 122.47, 122.47(a)(1).

8. Factors relevant to whether a compliance schedule in a specific permit is "appropriate" under 40 C.F.R. § 122.47(a) include: how much time the discharger has already had to meet the WQBEL(s) under prior permits; the extent to which the discharger has made good faith efforts to comply with the WQBELs and other requirements in its prior permit(s); whether there is any need for modifications to treatment facilities, operations or measures to meet the WQBELs and if so, how long would it take to implement the modifications to treatment, operations or other measures; or whether the discharger would be expected to use the same treatment facilities, operations or other measures to meet the WQBEL as it would have used to meet the WQBEL in its prior permit.

9. Factors relevant to a conclusion that a particular compliance schedule requires compliance with the WQBEL "as soon as possible," as required by 40 C.F.R. § 122.47(a)(1) include: consideration of the steps needed to modify or install treatment facilities, operations or other measures and the time those steps would take. The permitting authority should not simply presume that a compliance schedule be based on the maximum time period allowed by a State's authorizing provision.

10. A compliance schedule based solely on time needed to develop a Total Maximum Daily Load is not appropriate, consistent with EPA's letter of October 23, 2006, to Celeste Cantu, Executive Director of the California State Water Resources Control Board, in which EPA disapproved a provision of the Policy for Implementation of Toxic Standards for Inland Surface Waters, Enclosed Bays, and Estuaries for California.

11. A compliance schedule based solely on time needed to develop a Use Attainability Analysis is also not appropriate, consistent with EPA's letter of February 20, 2007, to Doyle Childers, Director Missouri Department of Natural Resources, nor is a compliance schedule based solely on time needed to develop a site specific criterion, for the same reasons as set forth in the October 23, 2006, (referenced in Paragraph 10) and February 20, 2007 letters.

If you have any questions, please contact me at (202) 564-0748 or have your staff contact Linda Boornazian at (202) 564-0221.